TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 184.

THE UNITED STATES, APPELLANT,

vs.

JOHN SMITH.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 28, 1904.

(19222.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 571.

THE UNITED STATES, APPELLANT,

vs.

JOHN SMITH.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

JOHN SMITH
vs.
THE UNITED STATES. } No. 21636.

I.—*Petition and amended petitions.*

On the 27th day of December, 1899, the claimant filed his preliminary petition, and on the 24th day of March, 1900, by leave of court the said claimant filed his first amended petition, to which on the 27th day of March, 1900, the defendants filed their demurrer.

On the 3d day of November, 1900, the claimant by further leave of court filed his second amended petition, in lieu of former petitions, which is as follows:

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Second amended petition. Filed Nov. 3, 1900.

The claimant, John Smith, respectfully represents that:

1. He enlisted for three years in the Navy of the United States on the 12th day of November, 1897, and pursuant to such enlistment was, at the time of the matters and things hereinafter set forth, an enlisted fireman, 1st class, in said Navy, and as such entitled to receive from the United States the sum of $35 per month.

2. While so serving he was, on May 26, 1899, charged with (merely) "refusing to do duty;" was thereupon put under arrest for trial on board a vessel belonging to the Navy, and was continuously kept so under arrest from May 26th until July 5th, 1899, when he was tried by a naval general court-martial on the sole charge of "refusing to obey the lawful order of his superior officer," in violation of art. 4, sect. 1624, Rev. Stat. No entry upon any ship's log alleged an offense against him other than a violation of art. 8, sect. 1624, R. S. Yet he was sentenced, on the said charge of violating art. 4, sect. 1624, R. S., to lose $376 of his pay, accruing between July 7, 1899, and July 7, 1900, and meanwhile to labor for the United States. Claimant performed such service until $200 of his pay has been withheld. The sole offense, if any, for which he was kept in arrest and tried as aforesaid was committed prior to the beginning of said arrest.

3 3. Said court-martial had no authority to try said charge, with its specification, in that no true copy of any statement of said charge and specification, or any report or other document containing them, was furnished him either before or at the time of his close arrest or confinement on them had exceeded 10 days, and had been recognized as an arrest for trial both by express admission or order and by lapse of time. (Art. 24 and 43, sect. 1624, Rev. Stat.) The log-book account of claimant's arrest and notification of charges, as filed by the Navy Department

in this case, July 17th, 1900, is herewith made a part of this petition. Other than is shown there and stated herein no prerequisites to trial, enjoined by art. 43, sect. 1624, Rev. Stat., were complied with at any time in behalf of claimant, and for the sole reason that naval regulations require furnishing a copy of the accusation to a prisoner only when the "person accused" is an officer (art. 1039, 1037, 1035, Navy Reg. of 1896).

4. The said sentence was null and void because it was adjudged upon a charge and specification which were other (and graver) than those a copy of which was furnished him at any time when he was put under arrest, and because there was no judgment by said court-martial either that intelligence of such other charge had not reached the officer ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent and could be produced at the trial. Claimant was deprived, from May 26th until July 1st, 1899, of a written voucher of any and all charges, specifications, and accusations against him.

4 No reason appeared to said court-martial for such withholding of notice and voucher other than that, by the partiality of regulations drafted by a fellow naval officer, influential and intelligent commissioned officers are required to be guarded from surprise through corrupt (or innocently unfair) alterations or additions to charges, while uninfluential "enlisted men" are not so protected, though subject to being charged, tried, and sentenced while without counsel, unable to get counsel, and denied counsel. (See the approved court-martial record in Gaynor, v. U. S., 21183 Ct. of Cl.)

5. There is due complainant the sum of $200 for pay as aforesaid, which is wrongfully withheld from him because of the pretended judgement of said pretended court-martial and for no other cause whatsoever.

Wherefore he says that there is justly due him the sum of $200, for which he demands judgement.

Claimant is the sole owner of this claim, has not assigned it to any extent, is justly entitled to said $200 from the United States, is a citizen thereof, has never been disloyal thereto and believes the foregoing allegations to be true. No action has been had on this claim in Congress or in any of the Departments.

George F. Ormsby, being duly sworn, does say: I am attorney for the claimant and believe the facts as stated in this petition to be true.

GEORGE F. ORMSBY.

Subscribed and sworn to before me this 3rd day of November, 1900.

A. LAW,
Commissioner of the Court of Claims.

5 II.—*Demurrer to second amended petition. Filed November 24, 1900.*

JOHN SMITH, v. UNITED STATES. } No. 21636.

And now come the said defendants, by their Attorney-General, and, demurring to the second amended petition in this cause, state as the ground thereof that the petition does not allege facts sufficient to constitute a cause of action.

L. A. PRADT,
Asst. Attorney-General.

Filed November 24, 1900.

III.—*Argument on demurrer.*

At a Court of Claims held December 3d and 4th, 1900, this cause was argued and submitted on the aforesaid demurrer.

6 IV.—*Opinion of the court, and dissenting opinion. Filed April 22, 1901.*

NOTT, Ch. J., delivered the opinion of the court.

This case presents the question whether an enlisted fireman in the Navy has been lawfully deprived of his lawful pay by the sentence of a court-martial. Questions of military law, or the proceedings of military courts, rarely come before civil courts for review or as subjects of adjudication, but there are some general principles applicable to all cases which it is always well, when a court is passing upon the action of a court-martial, to keep prominently in view.

In Dinsman v. Wilkes (12 Howard R., 390, 403) the Supreme Court said:

"It must be borne in mind that the nation would be equally dishonored if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer from malace or ill-will or the wantonness of power."

And the Supreme Court said, in Dynes v. Hoover (20 Howard R., 65, 81):

"Persons, then, belonging to the Army and the Navy are not subject to illegal or irresponsible courts-martial, when the law for convening them and directing their proceedings of organization and for trial have been disregarded. In such cases everything which may be done is void—not voidable, but void; and civil courts have never failed, upon a proper suit, to give a party redress who has been injured by a void process or void judgment. In England it has been done by the civil courts ever since the passage of the 1 Mutiny Act of William and Mary, ch. 5, 3d April, 1689. And it must have been with a direct reference to what the law was in England that this court said, in Wise v. Withers (3 Cr., 337), that in such a case 'the court and the officers are all trespassers.' When we speak of proceedings in a cause, or for the organization of the court and for trials, we do not mean mere irregularity in practice on the trial, or any mistaken rulings in respect to evidence or law, but of a disregard

of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of the law."

The Supreme Court again said, in Runkle v. United States (122 U. S. R., 543, 555, 558):

"A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved. (3 Greenl. Ev., sec. 470; Brooks v. Adams, 11 Pick., 441, 442; Mills v. Martin, supra; Duffield v. Smith, 3 S. & R., 590, 599.) Such, also, is the effect of the decision of this court in Wise v. Withers (3 Cranch, 331), which, according
7 to the interpretation given it by Chief Justice Marshall in Ex parte Watkins (3 Pet., 193, 207), ranked a court-martial as 'one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.' To give effect to its sentences, it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. (Dynes v. Hoover, 20 How., 65, 80; Mills v. Martin, 19 Johns., 33.) There are no presumptions in its favor so far as these matters are concerned. As to them, the rule announced by Chief Justice Marshall in Brown v. Keene (8 Pet., 112, 115) in respect to averments of jurisdiction in the courts of the United States applies. His language is: 'The decisions of this court require that averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments.' All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they be inferred argumentatively.

"Undoubtedly the President, in passing upon the sentence of a court-martial, and giving to it the approval without which it can not be executed, acts judicially. The whole proceeding from its inception is judicial. The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged according to law."

On the 17th July, 1862, Congress passed two statutes (12 Stat. L., p. 594; ib., pages 600–604, article 15), the one relating to the arrest and imprisonment of officers in the Army, the other to the arrest and imprisonment of persons in the Navy.

These statutes were passed in the midst of a great war; and concerning the circumstances which surrounded the former statute and led to its enactment, Mr. Blaine has said:

"In answer to the call upon the President for information, Mr. Lincoln sent a message to the Senate on the 1st of May, saying, 'General

Stone was arrested and imprisoned under my general authority, and upon evidence which, whether he be guilty or innocent, required, as appears to me, such proceedings to be had against him for the public safety.' The President deemed it 'incompatible with the public interest, and perhaps unjust to General Stone, to make a particular statement of the evidence.' After saying that General Stone had not been tried because the officers to constitute a court-martial could not be withdrawn from duty without serious injury to the service, the President gave this public assurance: 'He will be allowed a trial without unnecessary delay. The charges and specifications will be furnished him in due season, and every facility for his defense will be afforded him by the War Department.' This
8 message on its face bears evidence that it was prepared at the War Department, and that Mr. Lincoln acted upon assurances furnished by Mr. Stanton. The arrest was made upon his 'general' authority, and clearly not from any specific information he possessed. But the effect of the message was to preclude any further attempt at intervention by Congress. Indeed, the assurance that General Stone should be tried 'without unnecessary delay' was all that could be asked. But the promise made to the ear was broken to the hope, and General Stone was left to languish without a word of intelligence as to his alleged offense, and without the slightest opportunity to meet the accusers who, in the dark, had convicted him without trial, subjected him to cruel punishment, and exposed him to the judgment of the world as a degraded criminal.

"Release from imprisonment came at last by the action of Congress, coercing the Executive Department to the trial or discharge of General Stone. In the act of July 17, 1862, 'defining the pay and emolument of certain officers,' a section was inserted declaring that 'whenever an officer shall be put under arrest, except at remote military posts, it shall be the duty of the officer by whose orders he is arrested to see that a copy of the charges shall be served upon him within eight days thereafter, and that he shall be brought to trial within ten days thereafter unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days, or the arrest shall cease.'" (Twenty Years of Congress, vol. 1, p. 390.)

The statute relating to the Navy is without qualification, broader and more imperative in terms. It has since found its way into the Revised Statutes with no substantial change of phraseology, where it stands in these words:

"The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; and no other charges than those so furnished shall be urged against him at the trial, unless it shall appear to the court that intelligence of such other charge had not reached the officer ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent and can be produced at the trial; in which case reasonable time shall be given to the accused to make his defense against such new charge." (Rev. Stat., 1624, art. 43, p. 283.)

This statutory provision, moreover, is a revision in 1862, of one of the original rules and regulations for the government of the Navy, in these words:

"All charges on which an application for a general court-martial is founded shall be exhibited in writing to the proper officer, and the person demanding the court shall take care that the person accused be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; nor shall any other charge or charges than those so exhibited be urged against the person to be tried before the court, unless it appear to the court that intelligence of such charge had not reached the person demanding the court when the person so to be tried was put under arrest, or that some witness material to the support of such charge, who was at that time absent, can be produced; in which case reasonable time shall be given to the person to be tried to make his defense against such new charge." (Act 23d April, 1800, 2 Stat. L., pp. 50–51, art. 38.)

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The imperative words here are that "the person demanding the court shall take care that the person accused be furnished with a true copy of the charges," not that the court-martial shall take care. Moreover, the Attorney-General had decided in 1845, in the case of Captain Voorhees (4 Opns., pp. 410–414), that this provision of law applied only to cases where charges were preferred by one person against another. The language that the charges "shall be exhibited in writing to the proper officer," i. e., the officer who had power to order the court-martial, and that "the person demanding the court shall take care that the person accused be furnished with a true copy of the charges," fully sustains the construction given to it by the Attorney-General. In a word, while General Stone's arrest was receiving legislative attention and inquiry, Congress determined to change and reenact the navy article of 1800, and that change at that time must have been founded upon a legislative purpose.

In the present case it does not appear either by the record or dehors the record that the claimant was ever furnished with a copy of the charges. The nearest approach to furnishing him with a copy of the charges was, as appears by the log book, that on the 1st of July the judge-advocate of the coming court-martial read specifications to J. Smith. The prisoner had then been in close confinement since the 26th of May, under an order directing that "he be kept in single irons for safe-keeping to await trial by general court-martial."

The claimant has set up a good cause of action; that the defendants are indebted to him for wages in the amount of $200; and the defendants by their demurrer have confessed that much. The petition sets forth what are probably all the material facts of the case, and the defendants have confessed those facts so far as properly pleaded, likewise by their demurrer. If the record of the court-martial contains anything which will avail the defendants as a defense in this suit it was in their possession, and it was for them to bring it in and set it up as a defense to the claimant's cause of action. They not having done so, we must infer one substantial fact to be conceded, namely, that the claimant, who was arrested on the 26th of May and tried on the 5th of July, was never furnished with a copy of the charges and specifications upon which he was tried.

The question therefore presented to the court by this case is whether the act of 1862—that is to say, article 43, Revised Statutes—is mandatory or directory; whether the requirement "that the person accused shall be furnished with a true copy of the charges," and that "no other charges than those so furnished shall be urged against him at the trial," is jurisdictional.

The supreme Court, in the case of Dynes v. Hoover (20 How. R., 65-79), seems impliedly to have answered that question. The plaintiff's cases there rested upon his alleged want of jurisdiction in the court-martial. The Supreme Court held that the court-martial had jurisdiction, and its opinion enumerates the statutory requisites. Among these is placed the thirty-eighth article of 1800, which, says the court, provides "that charges shall be made in writing, which was done in this case. The court was lawfully constituted, the charge made in writing, and Dynes appeared and pleaded to the charge."

When so careful and learned a judge as Mr. Justice Wayne, after stating the law, is careful twice to state the fact that the charge was made in writing and that the prisoner "appeared and pleaded to the charge," it is plain that the Supreme Court regarded the charges and specifications prescribed by the statute as analogous to an indictment in an ordinary criminal case.

The act of 1800, as has been stated, was neither so broad nor so imperative as the provision in the Revised Statutes. With this decision of the Supreme Court before us, concerning the narrower and weaker statute, it is impossible for this court to hold that the provision in the Revised Statutes really means nothing at all. For, to say now in the face of that statute that an officer or seaman in the Navy can be arrested by his commanding officer; that he can be kept in close confinement for as long a time as General Stone was, without charges being preferred against him; that he can be carried to the other side of the world from the spot where the alleged offense was committed, and be first informed of it when the charges against him are read during the proceedings of the court-martial, would be to say that Congress had made no provision whatever for preserving the personal rights and liberties of the officers and men in the American Navy.

Mariners, whether in the merchant service or in the Navy, are, in the words of Story (1 Eq. Juris., 332), "a strangely improvident class of men, who seem to have mixed up in their character qualities of very opposite natures, and who seem, from their habits, to require guardianship during the whole course of their lives, having at the same time great generosity, credulity, extravagance, heedlessness, and bravery." "Courts of equity," he adds, "are always supposed to take an indulgent consideration of their interests and to treat them in the same light with which young heirs and expectants are regarded. Hence it is that contracts of seamen respecting their wages and prize money are watched with great jealousy, are generally relievable whenever any inequality appears in the bargain, or any undue advantage has been taken." Lord Stowell in the leading case of the "Juliana" (2 Dodson, 504), held that they should be relieved from the consequences of their own act, that of signing shipping articles whereby their wages might be inequitably forfeited.

And there is good reason for this; for sailors when on shipboard are beyond the reach of a writ of habeas corpus; are without legal advice,

and in the preparation of a defense without professional assistance, and on trial they come very near to being practically defenseless; for a judge-advocate, like other men, can not well serve two masters. In courts of equity, and in courts of admirality, and in legislative halls sailors have always been more or less subjects of protective jurisprudence or protective legislation, and to deprive a seaman of his wages one must proceed according to law and equity. In civil life a man can not be deprived of life, liberty, or property, except by due process of law. In the Army and Navy the proceedings are different, the safeguards are less assured, but the principle is the same. Neither Congress or the courts have
11 ever sanctioned arbitrary arrests or illegal imprisonment or the deprivation of a statutory right. And among the statutory rights which the military or naval prisoner has is that of being promptly informed of the offense whereof he stands accused. An entry on the log is not notice to the prisoner, for he has not access to the log. In the present case the seaman has been deprived of his wages; that is to say, of his property, and this court can not say that it has been done according to the plain and just purpose of the statute, which was intended to guard the personal rights of officers and men in the Navy.

Other important questions were presented to the court by the counsel for the claimant on the argument, but the decision is confined to the question of jurisdiction above considered.

The judgment of the court is that the demurrer of the defendants be overruled, and that the claimant recover the amount conceded to be due, $200.

With leave nevertheless to the defendants to plead to the petition within thirty days, in which case the judgment now entered will be vacated and set aside.

PEELLE, J., dissents:

I dissent from the conclusion of the majority of the court, though I heartily concur in all that is said in the opinion concerning the sacredness of the rights of seamen and of their exemption from illegal or irresponsible courts-martial, but I do not believe that the failure to furnish the claimant with a copy of the charges on which he was tried is jurisdictional. He went to trial without objection, and by doing so waived his right to such copy. (Lisle v. State, 6 Mo., 426; Smith v. State, 8 Ohio, 294; State v. Johnson, Walk. (Miss.), 392; Loper v. State, 3 How. (Miss.), 429.)

In the case of Dynes v. Hoover (20 How., 65, 82) the court, in speaking about the law for convening and directing the proceedings of courts-martial, say: "When we speak of proceedings in a cause or for the organization of the court and for trials, we do not mean mere irregularity in practice on the trial, or any mistake in rulings in respect to evidence or law, but of a disregard of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of law."

Again, in the case of Ex parte Reed (100 U. S. R., 13), where the court had jurisdiction of the subject-matter and the person of the defendant, the court said: "Having had such jurisdiction, its proceedings can not be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority. Its judgments,

when approved as required, rest on the same basis and are surrounded by the same considerations which gave conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest under like circumstances. The exercise of discretion within authorized limits can not be assigned for error and made the subject of review by an appellate court." See, also, In re McVey (23 Fed. Rep., 878); Dynes v. Hoover (supra).

Nor has any court the right to interfere with courts-martial in the performance of their duty. (Wales v. Whitney, 114 U. S. R., 564, 570.)

In that same case it was said: "The civil courts can relieve a
12 person from imprisonment under order of such court only by writ of habeas corpus, and then only when it is made apparent that it proceeds without jurisdiction." See also Keys v. The United States (109 U. S. R., 336).

If, therefore, the court had jurisdiction of the subject-matter and of the person of the defendant and complied with the rules prescribed by law for the exercise of its functions, its judgments can not be reviewed by this court.

The Congress is authorized by Article I, section 8, of the Constitution "to make rules for the government and regulation of the land and naval forces;" and by the fifth amendment to the Constitution it is provided that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land and naval forces, or in the militia, when in actual service or in time of war or public danger." * * *

By virtue of those provisions, the Congress have authorized courts-martial for the purpose of administering justice through military channels, and when the defendant enlisted in the Navy he not only thereby surrendered his right to be tried by the civil courts but subjected himself to the jurisdiction of courts-martial.

The record of the proceedings of the court-martial is not made part of the petition, and under the rule that where a pleading is ambiguous or susceptible of different interpretations, that construction shall be adopted which is most unfavorable to the party pleading.

There is no averment that the court was illegally convened or any facts disclosed which would warrant such a conclusion or that the court had not jurisdiction of the subject-matter. There is no averment that the charges against the accused were not in writting properly set forth in the court's proceedings. On the contrary, the log book of the vessel show that the judge-advocate read to the accused the specifications as stated in the court's opinion (ante, p. –). It appears from the averments that the claimant was arrested for "refusing to do duty," while it is averred that he was tried for "refusing to obey the lawful order of his superior officer," but the charges are the same in substance, only being stated in different language. The accused could not have been guilty of "refusing to do duty" except in disobedience of his superior officer who had the right to command him, and hence no question of jurisdiction can be assigned for mere matter of form.

In the opinion of the majority of the court it is said: "Other important questions were presented to the court by the counsel for the claimant on the argument, but the decision is confined to the question of jurisdiction above considered." That is to say, the question of jurisdiction

arising from the failure to furnish the accused with a copy of the charges and specifications against him as provided by article 43, Revised Statutes, section 1624.

That article provides in substance that such copy shall be furnished the accused at the time of his arrest; and the logic of the court's opinion is that if not so furnished the court is without jurisdiction of the person of the accused, although he went to trial without objection.

That same article (43, supra), however, also provides that the accused may be tried on a charge other than the one on which he was arrested if it "shall appear to the court that intelligence of such other charge had not reached the officer ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent and can be produced at the trial; in which case reasonable time shall be given to the accused to make his defense against such new charge," thus showing that the only purpose of the statute was to give the accused reasonable time within which to prepare his defense; and such reasonable time is a question within the discretion of the court and can not be made jurisdictional.

The averments in the petition are somewhat confusing, but from the opinion of the majority of the court the question of jurisdiction arises under article 43 (supra) for failure to furnish the accused with a copy of the charges against him at the time of his arrest, and upon that theory I have considered the case and reached the conclusion that the demurrer should be sustained and the petition dismissed.

13 V.—*Judgment on demurrer.*

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At a Court of Claims held in the city of Washington on the 22d day of April, 1901, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the claimant, John Smith, have and recover of and from the United States the sum of two hundred dollars ($200).

BY THE COURT.

14 VI.—*Traverse filed by the defendants. April 30, 1901.*

In the Court of Claims of the United States. December term, A. D. 1900.

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And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained and asks judgment that the petition be dismissed.

FELIX BRANNIGAN,
For the Assistant Attorney-General.

Filed by permission of the court in accordance with the opinion of the Chief Justice filed Apr. 22, 1901.
Filed April 30, 1901.

F. B.

VII.—*Argument and submission on merits.*

On the 4th and 9th days of December, 1902, this case was argued and submitted on the merits.

15 VIII.—*Order of court vacating judgment on demurrer, &c.*

At a Court of Claims held February 2, 1903, it was ordered
That this case having been brought to trial upon the merits by both parties, without objection by either, the claimant's motion for judgment upon the demurrer, filed May 24, 1901, be overruled and that the judgment upon demurrer be vacated and set aside as of April 30, 1901.

BY THE COURT.

16 IX.—*Findings of fact and conclusion of law. Filed February 2, 1903.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

On the 20th of November, 1897, the claimant enlisted in the United States Navy as a fireman of the second class, to serve for three years from that date unless sooner discharged by proper authority. He served as such until discharged, as hereinafter shown; and there remains due to him pay amounting to $376, unless the same was legally forfeited to the defendants by the sentence of the court-martial hereinafter set forth.

II.

On May 26, 1899, he was serving under said enlistment as a fireman of the first class, attached to and on board the U. S. S. "Yorktown," a vessel of the United States naval force at that time on the Asiatic Station, the "Yorktown" being then at anchor in Iloilo Harbor, P. I. On the same day he was reported by his superior officer to the commanding officer of the vessel as having refused to do duty, and that commanding officer awarded him the following punishment, namely: Put him under sentries as a prisoner in single irons for safe-keeping, to await trial by general court-martial; and he was continuously held as a prisoner thereafter until July 5, 1899, when he was sent in the custody of a chief master at arms to appear for trial before a general court-martial then convened on board the U. S. S. "Princeton," at Cavite, P. I.

III.

June 30, 1899, a charge, in writing, of "refusing to obey the lawful order of a superior officer" was preferred against claimant by Rear-Admiral Watson, the commander in chief of the United States naval force on the Asiatic Station, which specified the said offense; and
17 on the same day, by order of the said commanding officer of the said U. S. S. "Yorktown," the claimant, with other enlisted men of her crew, was ordered in double irons for safe-keeping.

IV.

Also on the same day, June 30, 1899, the said commander in chief appointed a general court-martial and ordered it to convene on Monday, July 3, 1899, on board the U. S. S. "Monadnock," at Cavite, P. I., for the trial of such persons as might legally be brought before it.

V.

At 10.30 a. m., July 1, 1899, the claimant received a copy of the charge and specifications so preferred against him; and on the same day an extra watch was ordered to stand guard over him and other prisoners then held for trial by general court-martial.

VI.

On Wednesday, July 5, 1899, pursuant to an adjournment of Monday, July 3, the said general court-martial met on board the U. S. S. "Princeton" at Cavite, P. I., for the trial of the claimant, and he was brought before the court at 10 o'clock a. m., in charge of the chief master at arms of the U. S. S. "Yorktown."

VII.

The following is a true and complete copy of the record and the proceedings of the said general court-martial in the case of the claimant:

Record of the proceedings of a general court-martial, convened on board the U. S. S. "Princeton," by virtue of a precept signed by Rear-Admiral John C. Watson, U. S. Navy, commander in chief, United States naval force on Asiatic Station, a certified copy of which is appended, marked "A."

U. S. S. PRINCETON, CAVITE, P. I.,
10.00 a. m., Wednesday, July 5, 1899.

The court met pursuant to the adjournment of Monday, July 3rd, and proceeded with the trial of John Smith, fireman, first class, U. S. Navy.

Present: Commander Clifford H. West, U. S. Navy; Commander Charles C. Cornwell, U. S. Navy; Lieutenant-Commander Alexander McCrackin, U. S. Navy; Lieutenant Simon Cook, U. S. Navy; Lieutenant Albert N. Wood, U. S. Navy; Captain Charles G. Long, U. S. Marine Corps; First Lieutenant Smedley D. Butler, U. S. Marine Corps, members, and First Lieutenant Dion Williams, U. S. Marine Corps, judge-advocate.

The accused, John Smith, fireman, first class, U. S. N., appeared before the court, and, in reply to a question by the judge-advocate, stated that he did not desire counsel.

The precept and letter ordering the court to meet on board the U. S. S. "Princeton," certified copies of which are appended, marked
18 respectively "A" and "Ab," were read to the accused by the judge-advocate.

The accused was asked if he objected to any member present, and replied that he did not.

The judge-advocate was duly sworn by the president, and the members were severally duly sworn by the judge-advocate; all of which oaths were administered according to law, and in the presence of the accused.

In reply to an inquiry by the judge-advocate, the accused stated that he had received a copy of the charge and specifications preferred against him, 10.30 a. m. July 1st, 1899.

The court was cleared to examine the charge and specifications (original appended, marked "C") and to consider all matters preliminary to the trial.

The doors being opened, the judge-advocate and the accused entered, and it was announced by the president that the court found the specifications in due form and technically correct.

In reply to an inquiry by the judge-advocate, the accused said that he was ready for trial.

All witnesses were directed to withdraw.

The judge-advocate read aloud a letter addressed to him, transmitting the charge and specifications preferred against John Smith, fireman, first class, U. S. N., original appended, marked "B."

The judge-advocate read aloud in the presence of the accused, the charge and specifications of charge preferred against him, and arraigned the accused as follows:

Q. John Smith, fireman, first class, U. S. N., you have heard the charge and specifications of charge preferred against you; how say you, to the specification of the charge, "Guilty or not guilty?"

A. "Not guilty."

Q. To the charge, "Guilty or not guilty?"

A. "Not guilty."

The prosecution began here.

George T. Brownridge, chief machinist, U. S. Navy, appeared as a witness for the prosecution, and was duly sworn by the president in the presence of the accused.

1. Question. What is your name, rate, and present station?

A. George T. Brownridge, chief machinist, U. S. Navy, U. S. S. "Yorktown."

2. Q. Do you recognize the accused; if so, as whom?

A. Yes; as First-Class Fireman Smith.

3. Q. What duty were you performing on the twenty-sixth day of May, this year?

A. Chief machinist, U. S. S. "Yorktown," at Iloilo.

4. Q. Did you detail the accused for any duty that day?

A. Yes, sir.

5. Q. What duty was it?
A. To stand watch.
6. Q. During which watch?
A. From twelve to four p. m.
7. Q. Did you tell the accused personally that he was detailed?
A. Yes, sir.

Cross-examined by the accused:

8. Q. In how many watches were the firemen standing?
19 A. In four, I think.
9. Q. When did I come off duty on the twenty-sixth day of May?
A. At eight o'clock a. m.
10. Q. Then, why was I detailed to stand the twelve to four watch if the firemen were in watch in four?
A. By order of the chief engineer a man going on liberty was second relief, you were to relieve him.
11. Q. What duty did I perform on that day from eight a. m. until noon?
A. Cleaning stations and bilges.
12. Q. Who was the man going on liberty in the second relief?
A. I don't remember.
13. Q. Who was the chief engineer at this time?
A. Chief Engineer Cleever; I beg pardon, that's a mistake, Mister Washington was chief engineer.
14. Q. Was I the next man for duty when I was detailed?
A. Yes; according to my orders.

Redirect examination by the judge-advocate:

15. Q. Did Mister Washington in giving you this order to detail the accused mention the name of the accused?
A. I had orders from Chief Engineer Cleever to appoint a second relief for a man going on liberty to take his watch. On this particular day Mister Cleever was not on duty. I told Mister Washington my orders, and he agreed with them—made no alterations.
16. Q. Was the detail of the accused a regular one?
A. Yes, sir; according to my orders.

The accused had no further questions to ask this witness.

The court had no questions to ask this witness.

There being no further questions to ask this witness, his testimony was read aloud to him and by him pronounced to be correct, and having been cautioned by the president not to discuss matters pertaining to the trial, he withdrew.

The court then took a recess until 1.00 p. m.

The court reassembled at the expiration of the recess. Present, all the members, the judge-advocate, and the accused.

Pope Washington, assistant engineer, U. S. Navy, appeared as a witness for the prosecution, and was duly sworn by the president in the presence of the accused.

Examination in chief by the judge-advocate:

1. Question. What is your name, rank, and present station?

A. Pope Washington; assistant engineer, U. S. Navy; attached to and serving on board the U. S. S. "Yorktown."

2. Q. Do you recognize the accused? If so, as whom?

A. I do; as J. Smith, fireman, serving on board the "Yorktown."

3. Q. What duty were you performing on the twenty-sixth day of May?

A. Officer of the deck of the U. S. S. "Yorktown," at anchor in Iloilo Harbor; also senior engineer officer on duty.

4. Q. Was the accused detailed for any duty on that day?

A. Yes; he was detailed to take the watch in the fire room from meridian to four p. m.

5. Q. Did he take the watch?

A. No.

20 6. Q. Why not?

A. He refused positively to do so.

7. Q. Was the accused ordered to take the watch, or not?

A. He was.

8. Q. By whom?

A. By the chief machinist on duty, and by myself.

9. Q. Was the accused regularly attached to the U. S. S. "Yorktown" at this time?

A. Yes.

The accused had no questions to ask this witness.

The court had no questions to ask this witness.

There being no further questions to ask this witness his testimony was read aloud to him and by him pronounced to be correct, and having been cautioned by the president not to discuss matters pertaining to the trial he withdrew.

The prosecution closes here.

The accused did not desire to call any witnesses, but submitted a written statement.

The court was cleared to examine it. The judge-advocate and the accused withdrew.

When opened, the judge-advocate and the accused entered and the accused was informed that the court was ready to hear his statement, and it was read by the judge-advocate and is appended, marked "1."

The defense closed here.

The judge-advocate submitted the case to the court without remark.

The trial was finished.

The judge-advocate at this point invited the attention of the court to the article of the U. S. Navy Regulations relating to the introduction of evidence of previous convictions, and requested that in case the court found the accused guilty of the charge, or guilty in a less degree than charged, the court be opened to receive evidence of previous trials and convictions, if such exist.

The court was cleared for deliberation, all the parties to the trial, the judge-advocate withdrawing, and, after maturely considering the evidence adduced, called the judge-advocate before it and directed him to

record that the court finds in the foregoing case of John Smith, fireman, first class, U. S. Navy, as follows:

The specification of the charge, "Proved."

And that the accused, John Smith, fireman, first class, United States Navy, is of the charge "Guilty."

The court was opened and the accused entered, and the president announced that the court was ready to receive evidence of previous convictions, as required by the U. S. Navy Regulations.

The judge-advocate then read aloud from the enlistment record of the accused two items, showing that the accused had been tried and convicted by summary court-martial. A copy of this much of the said enlistment record is appended, marked "2."

The court was then cleared to deliberate upon the sentence, the judge-advocate and the accused withdrawing, and after mature deliberation the judge-advocate was called before the court and directed to record the sentence of the court, as follows:

"To be confined in such place as the Secretary of the Navy may direct for a period of one year, to perform extra police duties during such confinement; to lose all pay that may become due him during
21 such confinement, except the sum of three dollars ($3.00) per month for necessary prison expenses, and a further sum of twenty dollars to be paid him at the expiration of his term of confinement, when he shall be dishonorably discharged from the United States Navy. Total loss of pay amounting to three hundred and seventy-six dollars ($376.00)."

C. H. West,
Commander, U. S. Navy, President of the Court.

Charles C. Cornwell,
Commander, U. S. Navy, and Member.

Alex. McCrackin,
Lieutenant-Commander, U. S. Navy, and Member.

Simon Cook,
Lieutenant, U. S. Navy, and Member.

A. N. Wood,
Lieutenant, U. S. Navy, and Member.

Chas. G. Long,
Captain, U. S. Marine Corps, and Member.

Smedley D. Butler,
First Lieutenant, U. S. Marine Corps, and Member.

Dion Williams,
First Lieutenant, U. S. Marine Corps, Judge-Advocate.

The court then proceeded with the trial of John Skerry, corporal, U. S. Marine Corps.

C. H. West,
Commander, U. S. Navy, President of the Court.

Dion Williams,
First Lieutenant, U. S. Marine Corps, Judge-Advocate.

FLAGSHIP BALTIMORE,
Manila, P. I., July 7th, 1899.

The proceedings, findings, and sentence in the foregoing case of John Smith, fireman, first class, United States Navy, are approved.

The U. S. S. "Yorktown" is designated as the place of confinement until an opportunity offers for sending him to the United States in a public conveyance.

J. C. WATSON,
Rear-Admiral, United States Navy, Commander in Chief,
United States Naval Force on Asiatic Station.

A.

UNITED STATES NAVAL FORCE ON ASIATIC STATION,
U. S. F. S. BALTIMORE,
Manila, P. I., June 30th, 1899.

To Commander CLIFFORD H. WEST,
U. S. Navy,
Commanding U. S. S. Princeton, Cavite, P. I.

By virtue of the authority vested in me as contained in article 38, section 1624, Title XV, chapter 10, of the Revised Statutes of
22 the United States, a general court-martial is hereby ordered to convene on board the U. S. S. "Monadnock," at Cavite, P. I., at 10.00 o'clock a. m. on Monday, July 3, 1899, or as soon thereafter as practicable, for the trial of John James Heggarty, coal passer, U. S. Navy, and of such other persons as may legally be brought before it.

The court is composed of the following members, any five of whom are empowered to act, viz: Commander Charles C. Cornwell, U. S. Navy; Lieutenant-Commander Alexander McCrackin, U. S. Navy; Lieutenant Simon Cook, U. S. Navy; Lieutenant Albert N. Wood, U. S. Navy; Captain Charles G. Long, U. S. Marine Corps; First Lieutenant Smedley D. Butler, U. S. Marine Corps, and of First Lieutenant Dion Williams, U. S. Marine Corps, as judge-advocate.

No other officers can be summoned without manifest injury to the service.

J. C. WATSON,
Rear-Admiral, United States Navy,
Commander in Chief, U. S. Naval Force on Asiatic Station.

I certify the above to be a true copy.

DION WILLIAMS,
1st Lt., U. S. M. C., J. A.

A B.

UNITED STATES NAVAL FORCE ON ASIATIC STATION,
FLAGSHIP BALTIMORE,
Manila, P. I., July 3, 1901.

SIR: The general court-martial of which you are president will hold its further session on board the U. S. S. "Princeton," at Cavite, P. I.

Very respectfully,

J. C. WATSON,
Rear-Admiral, U. S. Navy,
Commander in Chief U. S. Naval Force on Asiatic Station.

Commander C. H. WEST,
U. S. Navy, U. S. S. Princeton, Cavite, P. I.

I certify that this is a true copy.

DION WILLIAMS,
First Lieut., U. S. M. C., J. A.

B.

UNITED STATES NAVAL FORCE ON ASIATIC STATION,
FLAGSHIP BALTIMORE,
Manila, P. I., June 30, 1899.

SIR: I transmit herewith charge, with specification, against John Smith, fireman, first class, U. S. Navy, who will be tried before
23 the general court-martial of which you are judge-advocate, ordered to convene on board the U. S. S. "Monadnock," Cavite, P. I., July 3, 1899.

You will summon such witnesses as may be required for his defense.

Very respectfully,

J. C. WATSON,
Rear-Admiral, U. S. Navy, Commander in Chief
U. S. Naval Force on Asiatic Station.

First Lieutenant DION WILLIAMS,
U. S. Marine Corps, U. S. F. S. Baltimore, Manila, P. I.

C.

ASIATIC STATION, FLAGSHIP BALTIMORE,
Manila, P. I., June 30, 1899.

Charges and specifications of charges preferred by Rear-Admiral John C. Watson, United States Navy, commanding United States naval force on Asiatic Station, against John Smith, fireman, first class, United States Navy.

Charge.—Refusing to obey the lawful order of his superior officer.

Specification.—In that the said John Smith, a fireman, first class, in the United States Navy, attached to and serving on board the United States steamer "Yorktown," at Iloilo, Philippine Islands, having, on the twenty-sixth day of May, eighteen hundred and ninety-nine, been ordered by Assistant Engineer Pope Washington, United States Navy,

the officer of the deck, to go on duty in the fireroom of said vessel from noon until four hours post meridian of the said day, he having been previously detailed for this duty, did refuse to obey, and did willfully disobey, the said lawful order of his superior officer, the said Assistant Engineer Pope Washington, United States Navy, who was then and there in the execution of the duties of his office.

J. C. WATSON,
Rear-Admiral, U. S. Navy, Commander in Chief U. S. Naval Force on Asiatic Station.

Witnesses: Lieutenant C. Thomas, U. S. N.; Assistant Engineer Pope Washington, U. S. N.; Chief Machinist G. B. Brownbridge, U. S. N.

I certify that the accused received a true copy of this charge and specification at 10.30 a. m., July 1, 1899.

DION WILLIAMS,
First Lieut., U. S. M. C., J. A.

1.

STATEMENT OF THE ACCUSED.

To the president and members of the court:

I respectfully state that when I was ordered to take the watch in question, from noon to four p. m., on May 26th, 1899, I felt that
24 it was an injustice to me, and that I should not be required to perform more than my common share of the fireroom work.

I had come off watch at 8 a. m.; had worked hard from 8 a. m. until noon in the bilges under hot boilers, and also had my regular watch from 8 p. m. to midnight on that day.

It was my intention, when I refused to take the watch, to see the commanding officer and protest against what I considered this injustice to me, but I became excited and said more than I intended. I realized afterwards that I should have obeyed the order first and then appealed to the commanding officer.

I beg the court, in adjudging my case, to take into consideration the excitement under which I was at the time, and the extra amount of work required of me.

Very respectfully,

JOHN SMITH,
Fireman, First Class, U. S. N.

2.

[Enlistment Record.]

U. S. S. "Yorktown," 3d Rate.

Enlistments, 1897.
Serial Number 30.

Enlistment record of Smith, John, rate, fireman, 2d class; enlisted November 12, 1897, at sea, to serve three years from this date.

Previous naval service, about 3 years. First enlisted Sept. 26, 1894, as F. 2 cl. Served apprenticeship, no; seaman gunner, no; last discharge Nov. 11, 1897, from the U. S. S. "Yorktown," as fireman; holds C. S. C. No. F. D. 12981, and * * * good conduct medals. Trade, fireman; citizenship, U. S.

(Signed) HERBERT WINSLOW,
Lieut. Comdr., U. S. N., Recruiting Officer.

Approved:
C. H. STOCKTON,
Commander, U. S. N.,
Commanding U. S. S. Yorktown, 3d Rate.

(The above to be executed and signed at the rendezvous or on board the vessel where the man is enlisted.)

Record of Smith, John.

[Scale of marks: 0, bad; 1, indifferent; 2, fair; 3, good; 4, very good; 5, excellent. All information required by columns must be entered each quarter; also, upon transfer, discharge, desertion, or death.]

Name of vessel.	Date.	Rate.	Proficiency in rating.	Conduct.		Recommended for hon. discharge.	Recommended for G. C. medal if holds C. S. C.	Rating best qualified to fill.	Offenses or cause of disrating.	Punishments. (Note the date of issue of appointments and change in rating.)	Signature of commanding officer.
				Sobriety.	Obedience.						
Mohican.....	Mch. 31, 98	F. 1 C.	3.5	0	3	No.	No.	F. 1 C.	Drunk aboard ship; sentence S. C. M.	To be confined in single irons on b. and w. for 5 days; to lose 1 mos. pay, amounting to $30.00, and perform 2 mos. extra police duties.	(Sgd.) G. M. Book.
U. S. S. Mohican....	June 30, 1898	"	3.5	2	0	No.	No.	"	Insolence to officer of deck; sentence S. C. M.	Solitary conf't single irons, bread and water, 30 days, full rations every third day; to lose 1 mos. pay, amounting to $36.	(Sgd.) G. M. Book.

I certify that this is a true copy.

DION WILLIAMS,
First Lieut., U. S. M. C., Judge-Advocate.

II.

After the said trial of claimant the following order was issued:

General Court-Martial, Order No. 75.

NAVY DEPARTMENT,
Washington, September 6, 1899.

* * * * * * *

V. John Smith, fireman, first class, U. S. Navy, having been tried by general court-martial on board the U. S. S. "Princeton" and found guilty of "refusing to obey the lawful order of his superior officer" was sentenced "to be confined in such place as the Secretary of the Navy may direct for a period of one year; to perform extra police duties during such confinement; to lose all pay that may become due him during such confinement, except the sum of three dollars ($3.00) per month for necessary prison expenses, and a further sum of twenty dollars to be paid him at the expiration of his term of confinement, when he shall be dishonorably discharged from the United States Navy, total loss of pay amounting to three hundred and seventy-six dollars ($376.00).

25

The sentence was approved by Rear-Admiral Watson, who convened the court. The prison at the navy-yard, Mare Island, has been designated as the place of confinement, the period thereof to take effect from July 7, 1899, the date of approval of the sentence.

* * * * * * *

CHAS. H. ALLEN,
Acting Secretary.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant should recover judgment in the sum of three hundred and seventy-six dollars ($376).

X.—*Opinion of the court and dissent.*

OPINION.

NOTT, Ch. J., delivered the opinion of the court:

When this case came before the court upon demurrer (36 C. Cls. R., 304) it was understood that the petition fully and correctly set forth all the material facts of the case, and the court accordingly gave to the case all of the care and consideration which it could command in the belief that the decision would be final. The defendants, however, have come in and the case has gone to trial. The facts now found vary from those upon which the case was previously considered.

The principal question then before the court, and the only question upon which the court passed, was whether a person in the Navy, imprisoned on board a ship, could be brought to trial without having been "furnished with a true copy of the charges, with the specifications" (Rev. Stat., p. 283, sec. 1624, art. 43), and without knowing specifically what they were until he heard them read before the court on the trial. The petition contained an extract from the log book, by which it appears that on the 1st of July, the accused being in confinement, the judge-advocate

of the coming court-martial read the specifications to him. But in the case as now presented it appears by the record of the proceedings of the general court-martial that, "in reply to an inquiry by the judge-advocate, the accused stated that he had received a copy of the charge and specifications preferred against him, 10.30 a. m., July 1, 1899."

Two questions are now before the court: First, whether this recital in the proceedings of the court-martial is sufficient evidence—it not being a part of the judgment of the court—of the admission of the accused that he had received a copy of the charge and specifications preferred against him at a certain time; and, second, whether furnishing a man with a copy of the charge and specifications on the 1st July, who had been in
26 close confinement for an offense committed on the same ship, but at another place, since the 26th day of May, was a sufficient compliance with the statute, which requires that "the person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; and no other charges than those so furnished shall be urged against him at the trial." (Art. 43.)

As on the former hearing the court confined its judgment to the first clause of the statute, "the person accused shall be furnished with a true copy of the charges, with the specifications," so on the present hearing the court will confine its decision to the second clause, "at the time he is put under arrest." That is to say, we are considering only the question whether a seaman arrested on board his ship at Iloilo, P. I., on the 26th day of May can be kept in close confinement and carried to Cavite, P. I., and not be made acquainted with the charges preferred against him until the 1st of July following.

For the purpose of this inquiry we assume that the recital before quoted in the proceedings of the court-martial is sufficient evidence of the fact that the charge and specifications were furnished to the prisoner on the 1st of July. But it is not to be understood that the court so decides. That question is one which is by no means free from doubt. The recital is not a part of the findings of the court, of its judgment, of anything which the court did, but a part of the proceedings written up by the prosecuting officer; and the recital is not a statement of a fact, but merely an admission of a fact on the part of the accused. He did not write the admission; he did not dictate it; he did not sign it; he may not have understood it. All that we have is the judge-advocate's understanding of what the prisoner admitted.

For a clearer comprehension of the points involved in this case we must examine the law regulating arrest and confinement.

In the Navy, as in the Army, a man may be arrested by the captain of his ship or the colonel of his regiment and placed in confinement for trivial offences without an assigned reason being given. But here the law comes in and provides that this confinement shall not exceed ten days (Rev. Stat., p. 281, art. 24). A longer confinement for a greater offence can only be imposed upon him by the sentence of a court-martial. The words of the statute are: "Confinement with or without irons, single or double, not exceeding ten days, unless further confinement be necessary, in the case of a prisoner to be tried by court-martial." At the end of ten days one of two things manifestly should happen: Either the prisoner should be released, or it should appear in some way that he is

held to be tried by court-martial. This power to hold a man is unlimited; he may be confined with or without irons, single or double, until he is brought to trial.

But this power of indefinite confinement does not necessarily deprive a man of any legal right or personal safeguard. The law intends that when "confinement be necessary" he may be confined; that he may be rigorously confined "with or without irons, single or double;" that he may be thus kept in confinement until brought to trial; but it does not intend that he shall not have a fair trial or be deprived of any of the means of establishing his innocence.

In the early days of the Navy the original rules and regulations for its government contemplated that some one other than the commanding officer would prefer charges, and that they should be "exhibited in writing to the proper officer" and that "the person demanding
27 the court shall take care that the person accused be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest." The statute then inhibits the court-martial from trying the accused upon any other charges, making, however, provision to prevent a multiplicity of trials for newly discovered offenses, but positively declaring that in such cases of subsequent charges "reasonable time shall be given to the person to be tried to make his defenses against such new charge." (Act 23d April, 1800, 22 Stat. L., pp. 50, 51, art. 38.)

In like manner article 43 of the Revised Statutes (p. 283) guards against a multiplicity of trials. It is in these words:

"The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; and no other charges than those so furnished shall be urged against him at the trial, unless it shall appear to the court that intelligence of such other charge had not reached the officer ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent and can be produced at the trial, in which case reasonable time shall be given to the accused to make his defense against such new charge."

To the court it seems evident that the statute means what it says. The provision that "the person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest" can have but one meaning, and that meaning can not be expressed in plainer or simpler or more positive language than that used in the statute. That no other charges "shall be urged against him at the trial" is decisive of the intent. The person accused can not waive the nonfurnishing of the charges because he can not be called upon to plead to them. To hold the accused in confinement that he may be brought to trial upon charges; to bring him into court for trial upon them; to read them to him and call upon him to plead to them is to "urge" them, and to urge them is the only way in which charges against an accused person can be urged.

It has been suggested that the statute is directory and not mandatory. But the initial sentence of the articles (p. 275) declares that "the Navy of the United States shall be governed by the following articles." There is nothing in the forty-third article which indicates that it was

framed for the guidance of courts-martial or which implies that they may disregard its injunctions. "The person accused" is the subject of the article and every line is manifestly for his protection.

It has been suggested that time to prepare for trial is all that the statute accords to the person accused and that if sufficient time be granted to prepare his defense the terms of the statute will be satisfied; but to this there are two answers.

First. The statute contemplates the giving of reasonable time, and invests courts-martial with that power, and enjoins upon them that duty, but limits the authority to grant reasonable time to the "new" charges. There are two rules prescribed by the statute: As to the original charges upon which he was arrested, a true copy is to be furnished to the accused at the time he is put under arrest; as to the new charges not furnished to the accused at the time he was put under arrest, "reasonable time shall be given to the accused to make his defense."

Expressio unius, exclusio alterius.

28 Second. A court-martial is not invested with power or authority to grant time to persons accused. It is convened to try such persons as may be brought before it, and "the court is enjoined to sit from day to day, Sundays excepted, until sentence is given, unless temporarily adjourned by the authority which convened it." (Art 45.) All that a court-martial could do would be to report the facts to the officer who convened the court, and it would be a matter of discretion with him to allow or not allow an adjournment. Assuredly the law never intended that the personal rights and safeguards of any person accused of crime, of crime which might involve property, or liberty, or life itself, should be dependent upon the discretion of a commanding officer.

This forty-third article was first enacted in its present form during the civil war. The history of its enactment throws some light upon the intent of Congress. It is thus sketched in the preceding opinion on the demurrer in this case:

"On the 17th July, 1862, Congress passed two statutes (12 Stat. L., p. 594; ib., pp. 600–604, art. 15), the one relating to the arrest and imprisonment of officers in the Army, the other to the arrest and imprisonment of persons in the Navy.

"These statutes were passed in the midst of a great war and concerning the circumstances which surrounded the former statute and led to its enactment, Mr. Blaine has said:

"'In answer to the call upon the President for information, Mr. Lincoln sent a message to the Senate on the 1st of May, saying: 'General Stone was arrested and imprisoned under my general authority, and upon evidence which, whether he be guilty or innocent, required, as appears to me, such proceedings to be had against him for the public safety.' The President deemed it 'incompatible with the public interest, and perhaps unjust to General Stone, to make a particular statement of the evidence.' After saying that General Stone had not been tried because the officers to constitute a court-martial could not be withdrawn from duty without serious injury to the service, the President gave this public assurance: 'He will be allowed a trial without unnecessary delay. The charges and specifications will be furnished him in due season, and every facility for

his defense will be afforded him by the War Department.' This message on its face bears evidence that it was prepared at the War Department, and that Mr. Lincoln acted upon assurances furnished by Mr. Stanton. The arrest was made upon his 'general' authority, and clearly not from any specific information he possessed. But the effect of the message was to preclude any further attempt at intervention by Congress. Indeed, the assurance that General Stone should be tried 'without unnecessary delay' was all that could be asked. But the promise made to the ear was broken to the hope, and General Stone was left to languish without a word of intelligence as to his alleged offense, and without the slightest opportunity to meet the accusers who, in the dark, had convicted him without trial, subjected him to cruel punishment, and exposed him to the judgment of the world as a degraded criminal.

"'Release from imprisonment came at last by the action of Congress, coercing the executive department to the trial or discharge of General Stone. In the act of July 17, 1862, 'defining the pay and emolu-
29 ment of certain officers,' a section was inserted declaring that 'whenever an officer shall be put under arrest, except at remote military posts, it shall be the duty of the officer by whose order he is arrested to see that a copy of the charges shall be served upon him within eight days thereafter, and that he shall be brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days, or the arrest shall cease.'" (Twenty Years of Congress, vol. 1, p. 390.)

"The statute relating to the Navy is, without qualification, broader and more imperative in terms. It has since found its way into the Revised Statutes with no substantial change of phraseology."

It is needless to advert to the many decisions of the Supreme Court holding that statutory regulations governing the proceedings of a court-martial must be complied with. They are summed up in a sentence or two in the case of Brown v. Keene (8 Peters, 112): "The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged according to law;" and are reiterated in Runkle v. United States (122 U. S. R., 543).

Finally, it has been said that the statement of the accused set forth in the proceedings of the court-martial is substantially a confession, and that no wrong can be done to a man who is thus self-convicted.

But concerning this so-called "confession," there are two things to be said: First, it did not constitute the only evidence before the court-martial; and, second, the statement shows that a man who had worked hard for four hours "in the bilges under hot boilers, and also had had his regular watch from 8 p. m. to midnight," and being ordered by an assistant engineer to go on duty from noon to 4 p. m., thought that injustice was done to him and "became excited and said more than he intended." It is impossible for this court to believe that upon that statement alone, due regard being given to every part of it, a court-martial

would have sentenced a man "to be confined in such place as the Secretary of the Navy may direct for a period of one year; to perform extra police duties during such confinement; to lose all pay that may become due to him during such confinement, except the sum of $3 per month for necessary prison expenses, and a further sum of $20 to be paid him at the expiration of his term of confinement, when he shall be dishonorably discharged from the United States Navy, total loss of pay amounting to $376."

The judgment of the court is that the claimant recover all of the pay withheld from him under and by authority of the sentence of the court-martial, amounting to $376.

PEELE, J., dissenting:

I dissent from the foregoing opinion for the reasons set forth in my dissenting opinion when the case was submitted upon demurrer (36 C. Cls. R., 325).

30 XI.—*Final judgment of the court.*

JOHN SMITH
v.
UNITED STATES. } No. 21636.

At at Court of Claims held in the city of Washington on the second day of February, 1903, judgment in the above-entitled cause was ordered to be entered as follows:

The court, upon due consideration of the premises, find for the claimant and do order, adjudge, and decree that the claimant, John Smith, do have and recover of and from the United States the sum of three hundred and seventy-six dollars ($376).

BY THE COURT.

31 XII.—*Application for appeal filed by the defendants February 11, 1903.*

JOHN SMITH
v.
UNITED STATES. } No. 21636.

From the judgment rendered in the above-entitled cause on the 2nd day of February, 1903, in favor of the claimant, the defendants, by their Attorney-General, on the 11th day of February, 1903, make application for and give notice of an appeal to the Supreme Court of the United States.

LOUIS A. PRADT,
Assistant Attorney-General.

Filed February 11, 1903.

32 XIII.—*Defendants' motion to set aside judgment and dismiss petition. Filed March 23, 1903.*

Now come the defendants, by the Attorney-General, and move the court to set aside the judgment rendered in the above-entitled cause in favor of the claimant on February 2, 1903, on the ground that the court erred in rendering said judgment for the following reasons:

First. The judgment is for pay to the amount of three hundred and seventy-six dollars alleged to be due to the claimant as an enlisted fireman of the second class of the United States Navy. Long before said judgment was rendered, to wit, on December 13, 1902, the defendants filed a motion in said cause for leave to withdraw their request for findings of fact and to substitute in lieu thereof another request for findings of fact.

Second. None of the various petitions and amended petitions in
33 said cause are signed or verified by the claimant, but each and every one of said petitions has been signed and verified by one George F. Ormsby, who alleges himself to be the attorney of the claimant in the above-entitled cause.

L. A. PRADT,
Asst. Attorney-General.

FELIX BRANNIGAN,
Assistant Attorney.

Filed March 23, 1903.

34 XIV.—*Order overruling defendants' motion of March 23, 1903, to set aside judgment and dismiss the petition. Filed May 25, 1903.*

This case has been twice elaborately argued and carefully considered (36 C. Cls. R., 304; 38 ib.), to wit, when it was determined upon demurrer and upon the evidence. The record states with unusual ful'ness and clearness every fact which will enable the Supreme Court to pass upon the questions of law involved. The amount involved in this case is trivial, but the questions of law presented by it are of very grave importance. The case was selected as one which would present these questions to the Supreme Court with unusual clearness, and the facts now sought to be brought into the case are irrelevent and immaterial and will not change the result. The defendants' motion to set aside the judgment and dismiss petition, filed March 23, 1903, after judgment, accordingly is overruled.

Should the judgment be affirmed by the Supreme Court the defendants may apply for a stay of proceedings until the claimant's attorney shall satisfy the court that he is entitled to have a transcript of the judgment transmitted to the Treasury for payment.

All requests on the part of the defendants for findings of fact, filed before or at the time of trial, will be certified to the Supreme Court.

BY THE COURT.

Filed May 25, 1903.

35 XV.—*Defendants' motion for and allowance of appeal.*

JOHN SMITH
v.
UNITED STATES. } No. 21636.

At a court of claims held January 5, 1904.

Assistant Attorney-General Pradt for the defendants moved the allowance of the application for an appeal filed herein February 11, 1903.

And it was ordered that the appeal be allowed as prayed for.

BY THE COURT.

36 In the Court of Claims.

JOHN SMITH
v.
UNITED STATES. } No. 21636.

I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the judgment upon demurrer and of the order vacating and setting aside the same, of the findings of fact and conclusion of law filed by the court, of the opinions of the court and the dissenting opinion, of the final judgment of the court, of the motion of the defendants to set aside said judgment, of the order of the court overruling said motion, of the application of the defendants for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 21st day of January, A. D. 1904.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No. 19222. Court of Claims. Term No. 571. The United States, appellant, *v.* John Smith. Filed January 5, 1904. File No. 19222.

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Office Supreme Court U. S.
FILED
MAY 16 1904
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, APPELLANT,
v.
JOHN SMITH.
} No. ~~571~~. 184.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, APPELLANT,
v.
JOHN SMITH.
No. 571.

MOTION TO ADVANCE.

The Solicitor-General moves the court to advance the above case for an early hearing at the October term, 1904.

This motion is made at the express request of the Secretary of the Navy in a letter to the Attorney-General, dated February 20, 1904, in which the following statement is submitted:

> Article 43 of the Articles for the Government of the Navy, section 1624, Revised Statutes, prescribes that—
>
> "The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; * * *"
>
> Under the decision of the Court of Claims above cited, as this Department understands that decision, the proceedings of a court-martial are illegal and void unless the record shows that the accused was furnished with

a copy of the charges and specifications immediately upon his arrest or apprehension. Smith was furnished with a copy of the charges and specifications, as the record shows, four days before he was brought to trial, but the Court of Claims held that this was not sufficient, and gave judgment in his favor for the loss of pay forfeited by the sentence.

If this construction is correct, a majority of the sentences imposed by courts-martial during the past forty years, and the proceedings of courts-martial now sitting from day to day, would appear to be invalid.

The purpose of this letter is to bring to attention the state of confusion and practical paralysis into which the administration of naval justice will be thrown if this decision is upheld, and, in view of the fact that this Department feels it to be its duty to be guided by rulings and decisions of the courts wherever they interpret the statutes with which the Navy has to do, to ask specifically that the case in question, that of *John Smith* v. *The United States*, be advanced on the docket of the Supreme Court in order that the final and authoritative determination of the question involved may be had at the earliest practicable moment.

This request is preferred in consideration of the significance to the discipline of the Navy of the question raised.

HENRY M. HOYT,
Solicitor-General.

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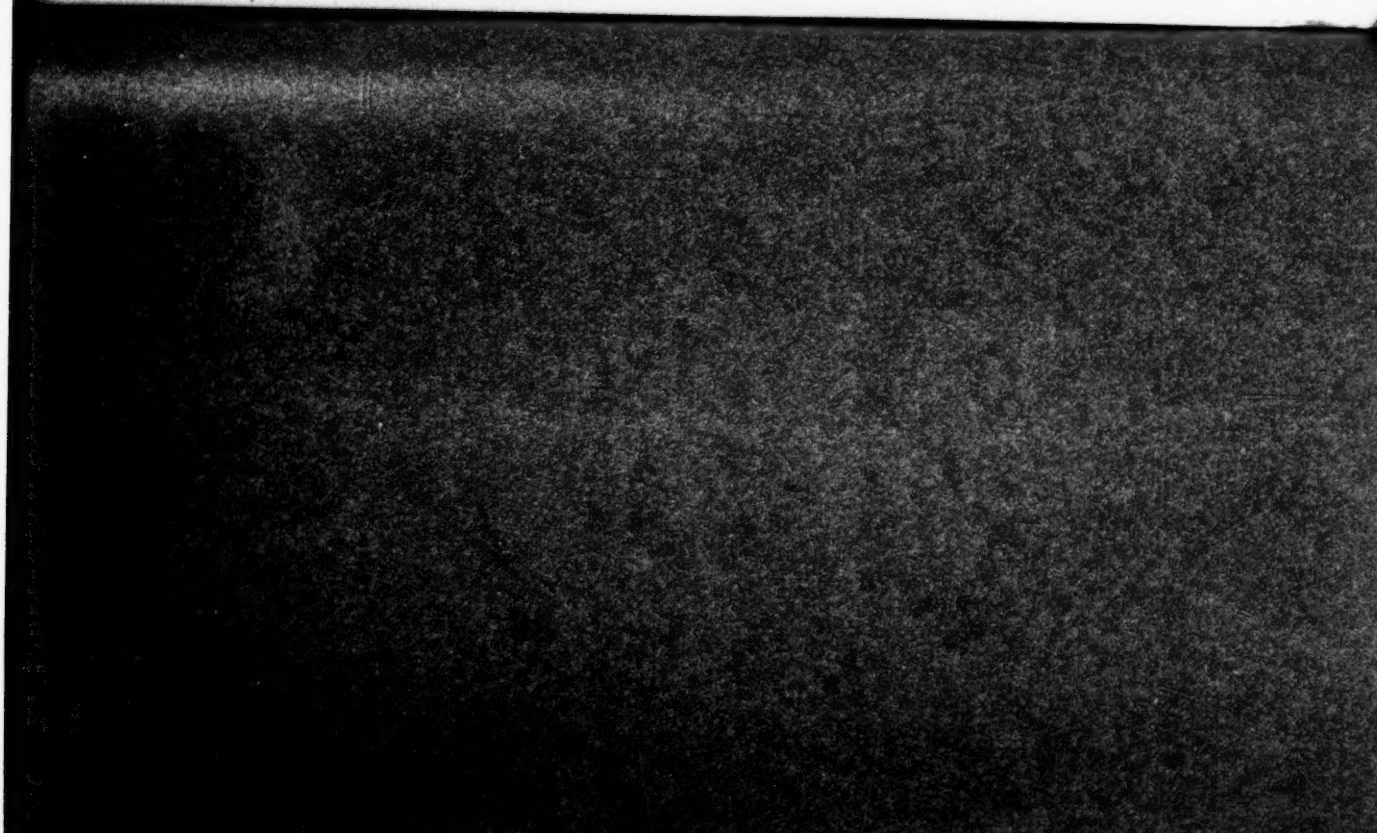

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, APPELLANTS,
v.
JOHN SMITH.
} No. 184.

BRIEF FOR APPELLANTS.

STATEMENT.

On November 20, 1897, appellee enlisted in the United States Navy as a fireman of the second class to serve for three years from that date, unless sooner discharged by proper authority (R., 11, 20).

On May 26, 1899, he was serving under said enlistment as a fireman of the first class, attached to and on board the U. S. S. *Yorktown*, which vessel was then at anchor in Iloilo Harbor, P. I., and one of the vessels of the Asiatic squadron of the United States Navy (R., 11). On the same day and vessel he was reported by his superior officer to the commanding officer of said vessel as having refused to do duty, and the commanding officer awarded him the following punishment: "Put him under sentries as a prisoner in single

irons for safe-keeping, to await trial by general court-martial;" and he was continuously held as a prisoner thereafter on said vessel until July 5, 1899, when, at 10 o'clock a. m., he was brought by the chief master of arms of his vessel before a general court-martial then duly met on board the U. S. S. *Princeton*, at Cavite, P. I., which had been duly convened for his trial for said military offense by virtue of a precept signed on board the U. S. S. flagship *Baltimore* on June 30, 1899, at Manila, P. I. (R., 17), by the rear-admiral commander in chief of the United States naval forces on the Asiatic station.

There is nothing in the record to show that there was any earlier opportunity to bring the prisoner before a general court-martial for trial for that offense.

On June 30, 1899, said rear-admiral preferred a charge in writing against said prisoner (the appellee) of "refusing to obey the lawful order of a superior officer," which specified the said offense (R., 18, C), and on the same day he transmitted said charge and specification to the judge-advocate of said general court-martial, which was then ordered to convene on board the U. S. S. *Monadnock*, at 10 o'clock a. m., on Monday, July 3, 1899, at Cavite, P. I., for the trial of such persons as might legally be brought before it. (R., 17, A.)

On July 1, 1899, at 10.30 o'clock a. m., said prisoner (the appellee) received a true copy of said charge and specification. (R., 13, 19.)

On July 3, 1899, the said rear-admiral ordered said general court-martial to hold its further sessions on

board the U. S. S. *Princeton*, at Cavite, P. I. (R., 18, A. B.)

On July 5, 1899, said prisoner (the appellee) was duly brought before and tried by said general court-martial on said charge and specification, and he was found "guilty" of said charge and specification, and sentenced as follows:

> To be confined, in such place as the Secretary of the Navy may direct, for a period of one year; to perform extra police duties during such confinement; to lose all pay that may become due him during such confinement, except the sum of three dollars ($3.00) per month for necessary prison expenses, and a further sum of twenty dollars to be paid him at the expiration of his term of confinement, when he shall be dishonorably discharged from the United States Navy. Total loss of pay amounting to three hundred and seventy-six dollars ($376). (R., 16.)

On July 7, 1899, the proceedings, findings, and sentence in the said general court-martial case of the appellee were approved by the said rear-admiral, and the U. S. S. *Yorktown* was then designated as the place of confinement of the prisoner until an opportunity should offer for sending him to the United States in a public conveyance. (R., 17.)

Judgment was entered in the court below on the second amended petition in favor of the claimant for $376. (R., 27.)

All the facts of this statement are clearly set forth in the findings of fact in this record, pages 11–22.

ASSIGNMENT OF ERRORS.

1. The court below erred in holding that the said general court-martial had no jurisdiction to try the said prisoner (the appellee, John Smith), on the ground that he was not furnished on the very day upon which he committed the offense (namely, on May 26, 1899), for which he was afterwards tried, convicted, and sentenced by the said general court-martial, with a true copy of the charge and specification of the offense for which he was so tried.

2. The court below erred in holding that the proceedings, trial, conviction, and sentence of the said prisoner by said general court-martial were null and void, because he was not furnished, on said May 26, 1899, with a true copy of said charge and specification.

3. The court below erred in rendering a judgment against the United States in this cause, because the said prisoner (the appellee) was in fact furnished a true copy of the said charge and specification at 10.30 o'clock a. m. on July 1, 1899, which time was exactly four days before the said accused was produced for trial before said general court-martial. (R., 12, 13, 19.)

BRIEF OF ARGUMENT.

I.

a. The question of law involved is simply this:

WAS THE DELIVERY TO THE PRISONER (THE APPELLEE) ON JULY 1, 1899, OF THE TRUE COPY OF THE CHARGE AND SPECIFICATION OF THE OFFENSE WHICH HE COMMITTED ON MAY 26, 1899, AND FOR WHICH HE WAS TRIED, CONVICTED, AND SENTENCED ON JULY 5, 1899, BY A GENERAL COURT-MARTIAL, A SUFFICIENT COMPLIANCE WITH ARTICLE 43 OF THE ARTICLES WHICH GOVERN THE NAVY OF THE UNITED STATES? (Rev. Stat., Sec. 1624, pp. 275–283.)

This article reads as follows:

> Art. 43. The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; and no other charges than those so furnished shall be urged against him at the trial, unless it shall appear to the court that intelligence of such other charge had not reached the officer ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent and can be produced at the trial; in which case reasonable time shall be given to the accused to make his defense against such new charge.

No other charge or specification was preferred against the prisoner, and the question therefore relates to *the time* of furnishing him "a true copy of the charge and specification" on which he was tried by the court-martial.

The majority of the court below have agreed, *as a conclusion of law*, that the prisoner *was not* furnished a

true copy of the charge and specification *at the time* contemplated by article 43, namely, *in their opinion*, on May 26, 1899. But all of the judges have found *as a fact* that he *was* furnished a true copy of said charge and specification on July 1, 1899.

b. The judgment appealed from is founded upon unreasonable interpretation of Article 43. "*It rests upon a construction which is too literal.*" (*United States* v. *Finnell*, 185 U. S., 236, 242.) *It well illustrates the maxim*, "*Qui hæret in litera, hæret in cortice.*"

The Court of Claims has no jurisdiction whatever to review the lawful sentence of any duly convened court-martial, nor to impugn by doubts the verity of its record or justice of its sentence. Consequently the doubts expressed in the last majority opinion of the court below (R. 23) as to the verity of the Court-Martial Record, and the integrity of the judge advocate, are entitled to no serious consideration here. Nor is the implied reflection upon the justice and fairness of the sentence of that general court-martial (R. 26, 27). All we have to say about such questions as these is that in this country courts-martial are courts of record—so far, at least, as the statute requires records to be made and preserved. Like our inferior courts they derive their jurisdiction from and are regulated by Congress (*Dynes* v. *Hoover*, 20 How., 65, 82); and no civil court can review their proceedings or sentences (*Ex parte Watkins*, 3 Pet., 193). They have general jurisdiction of all military offences. The act of Congress, passed more than a hundred years

ago, requires the president of every court-martial to administer an oath to the judge-advocate that he will "*keep a true record of the evidence given to and the proceedings of this court;* * * *" (Art. XXXVI, 2 Stat., 50; Art. 40, p. 283, Rev. Stat.).

Per Reed, J. in *Davis* v. *Township of Delaware*, 41 N. J. L. Rep., 55, 57 (cited in the dissenting opinion of Mr. Justice Brown in *United States* v. *Finnell*, 185 U. S., 248):

> The rule is that a record imports such absolute verity that no person against whom it is produced shall be permitted to aver against it. And this rule is of equal force whether the record is involved directly or collaterally. The leading case upon this branch of estoppels is that of *Rex.* v. *Carlile*, 2 B. and Ad., 392.

c. To intelligently interpret the following language of Article 43, viz:

> *The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest;* * * *

is not quite as simple a proposition as might be inferred from the language of the majority opinion below (R. 25), which reads as follows:

> To the court it seems evident that the statute means what it says, * * * and that meaning can not be expressed in plainer or simpler or more positive language than that used in the statute * * *.

Doubtless the language we have above italicized had a meaning plainly intelligible in the original statute from

which it was reenacted in the act of July 17, 1862 (12 Stat., 604), which was compiled into the Revised Statutes; but evidently that meaning had not even the remotest relation to the jurisdiction of a general court-martial. *Therefore it has no such relation now.* It was originally enacted in the act entitled "An act for the better government of the Navy of the United States," approved April 23, 1800 (2 Stat., 45), Article 38 of which reads as follows:

> Art. XXXVIII. *All charges, on which an application for a general court-martial is founded, shall be exhibited in writing to the proper officer, and the person demanding the court shall take care that* the person accused be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest, * * * (*ib.* 50).

The words in said Article XXXVIII, which we have above italicized, are omitted from article 15 of the act of July 17, 1862 (12 Stat., 604), from which article 43, in the Revised Statutes, page 283, is literally transcribed. They plainly refer to a time when any officer of the Navy could prefer a charge and specification against a brother officer for a military offense with a view of having the offender tried by a court-martial on that charge. No officer was to be arrested for trial for such an offense until the accuser had put the charge and specification into writing and furnished a copy of it to the accused. This manly practice in our naval service put the accuser and accused on an equal footing before the officer who had

jurisdiction to order the offender into arrest and to determine whether the latter should or should not suffer the indignity of being subjected to a trial before a general court-martial. Substantially the same manly principle is still strictly observed between brother officers in our Navy. Of course this principle does not mean that an officer could not be summarily arrested for a serious breach of duty. (See Art. 24, Rev. Stat., 281; Art. 30, 2 Stat., 49.)

A similar time-honored manly custom has always existed in the Navy in regard to enlisted men who violate any of the rules for the government of the Navy; it is called the Order to the Mast. This ceremony is described at length by the Navy Department in Appendix A, p. 25, *post*. Suffice to say that when an enlisted man commits such an offense he is "ordered to the mast" for a hearing, whereupon he is verbally charged with the offense, has a hearing before the commanding officer of the vessel, who then considers the statements of the parties and witnesses and orders the person so charged either to return to duty or to be put in arrest to await trial by court-martial. Of course in the latter event the ceremony is in the nature of a hearing and commitment before a committing magistrate, and is preliminary to a report of the facts by the commander of the vessel to the officer who is authorized by law to draft and prefer the charge and specification of the offense committed and to convene a general court-martial for the trial of the offender. That officer, in the case at bar, was the admiral commanding in chief the Asiatic

Squadron; and in the same case the accused was furnished a true copy of the charge and specification of his offense four (4) whole days before he was arraigned in the court-martial. (R., 12, V. 13, 19 C.) Obviously, therefore, a sailor's rights and liberties are as well respected in our Navy as are "the most sacred questions of human rights on trial in any court of justice." (R., 26.)

Indeed we might be allowed to say here that a sailor's rights and liberties are better guaranteed on our vessels of war than are those of our most favored citizens on shore, and there is no occasion for any civil judge or court to assume the robes of the chancellor for his protection merely because sailors may have been considered in early days as "a strangely improvident class of men," whose whole course of life was one of "generosity, credulity, extravagance, heedlessness, and bravery" (R., 7). They are abundantly able to take care of themselves and of the nation at sea. There they are our guardians.

When a civilian is arrested on shore for the most heinous crime against the United States, the act of Congress says, it is sufficient to give him a copy of the indictment *three* whole days before his trial if he was arrested for treason, or *two* whole days if he was arrested for any lesser crime. This act is almost as old as the Constitution (act of April 30, 1790, ch. 9, sec. 29, 1 Stat., 118; Rev. Stat., 1033). It does not limit the jurisdiction of our judicial courts in criminal cases. It follows the principle of the English statutes of 7 W.

III, ch. 3, sec. 1, and 7 Anne, ch. 3, sec. 11; ch. 21, sec. 11.

United States v. *The Insurgents*, 2 Dall., 334, 341.

United States v. *Wood*, 3 W. C. C., 440.

United States v. *Curtis*, 4 Mas. C. C., 232.

The Supreme Court of the United States says that when a sailor is put in arrest for violating one of the articles for the government of our Navy, if he be furnished a true copy of the charge and specification of that offense *four days* before he is brought before a court-martial, this is "a sufficient compliance" with Article 43 (*Johnson* v. *Sayre*, 158 U. S., 109, 118); therefore it is not material what any other court may say on that question, and of course we must assume, in the absence of proof to the contrary, that the sailor always gets a speedy trial.

II.

The Court of Claims has no jurisdiction whatever to nullify the lawful sentence of any duly convened court-martial, nor to impugn by doubts or reflections the fairness and justice of a lawful sentence of any court-martial. The most that any civil-judicial court can do in regard to any court-martial is to determine whether the court had jurisdiction to try and sentence the prisoner. But the court-martial jurisdiction can not be inquired into in any collateral proceeding, such, for example, as in a suit to recover judgment in the Court of Claims for the wages of seamen or coal passers in the United States Navy which were forfeited, as in

this case, by the sentence of duly convened general court-martial. (*Ex parte* Watkins, 3 Pet., 193, 201.)

This doctrine is not a novel one in the judicial courts. We might, therefore, very properly close our brief for appellants here.

But as the Navy Department is justly much aggrieved and its court-martial records are jeopardized by the majority judgment and opinions of the court below, we shall go on to cite and discuss a few of the opinions of the Supreme Court in regard to the question presented by this appeal. Before we begin the discussion, however, we most respectfully say that the last majority opinion of the court below (Rec., 22–27) does not state the law correctly as to the jurisdiction of a general naval court-matial, because it ignores the principle that good law "is the perfection of reason." Measured by that wand it would fail to convince a sailor's reason, much less a lawyer's, especially if the latter have any knowledge of naval affairs and necessary discipline.

Can it reasonably be said that the framers of Article 43 intended that it should be interpreted to mean that if an officer or enlisted man in the naval service of the United States should strike or assault his superior officer on the quarter-deck of a vessel of war—perhaps in presence of the enemy—or refuse to obey the lawful order of his superior officer, such an offender can not be tried by a naval court-martial unless he be furnished on that very day a true copy of the charge and specification of that offense?

Of course every officer and enlisted man in the Navy knows that such an offense is a most grave military one, and that the offender must at once be ordered into arrest—and placed in irons if necessary, else there would be an end to all discipline. Every officer and enlisted man in the Navy also knows that the admiral commanding a squadron or fleet on a foreign station is the only officer of the Navy who can convene a general court-martial, and who can prefer a charge and specification of such an offense committed on one of his vessels and order the offender to be tried by general court-martial.

Where might the flagship be at such time? Where the offender's vessel? The former at Cavite, P. I., perhaps, the latter, as in this suit, at Iloilo Harbor. (The logs of the vessel on the foreign station would show.) Must all of the vessels of the squadron or fleet be always within twenty-four hours of the admiral in command while on a foreign station? Or must the offender be free from arrest until the admiral hears of the offense, prefers the charge, convenes a general court-martial, sends the written charge to the judge-advocate of that court, and the latter, or some other officer, has furnished a copy of that charge and specification to the offender? If there be any logic in the opinions of the majority of the court below, such logic is an affirmative answer to these questions.

These questions were all adversely decided in *Johnson* v. *Sayre* at the October term of 1894 (158 U. S.,

109–117). Delivering the opinion in that case, Mr. Justice Gray said:

> The provision of article 43 of the Articles for the Government of the Navy, which prescribes that "the person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest" (on which Sayre relied before the court-martial, and in this court), evidently refers, as appears by the very next article, to the time when he "is arrested for trial" by court martial, and not to the time of any previous arrest, either by way of punishment, or to await the action of a court of inquiry. Rev. Stat., § 1624, arts. 24, 43, 44, 45. Sayre, being already in custody to await the result of a court of inquiry, could not be considered as put under arrest for trial by court-martial, before the Secretary of the Navy had informed him of the report of the court of inquiry, and had ordered a court martial to convene to try him. Immediately after that, and four days before the court martial met, he was furnished with a copy of the charge and specification on which he was to be tried. This was a sufficient compliance with the article in question. And it is, at the least, doubtful whether the objection that it had not been sooner delivered to him did not come too late, after he had admitted before the court martial that he had received a copy of the charge and specification, and after objections to the jurisdiction of the court and to the form of the accusation had been made and overruled, and he had pleaded not guilty, and the evidence for the United States had been introduced.

> The court martial having jurisdiction of the person accused and of the offense charged, and having acted within the scope of its lawful powers, its decision and sentence can not be reviewed or set aside by the civil courts, by writ of *habeas corpus* or otherwise. *Dynes* v. *Hoover*, 20 How., 65, 82; *Ex parte Reed*, 100 U. S., 13; *Ex parte Mason*, 105 U. S., 696; *Smith* v. *Whitney*, 116 U. S., 167, 177–179.

In appellee's case, of course, no court of inquiry was held because he was not an officer. But we must know, according to Navy custom, that he was 'ordered to the mast' on May 26, 1899; he was then reported to the commanding officer of his vessel as having refused to do duty—one of the most serious offenses known to military law—and on the same day he was, by order of that officer, put under sentries as a prisoner for safe-keeping, to await trial by a general court-martial. He was, therefore, continuously held a prisoner thereafter until July 5, 1899, when he was sent before a general court-martial to be tried for that offense.

In the case of *Johnson* v. *Sayre*, it appears that the accused, at the time of his trial, objected to the court-martial that a copy of the charge and specification had not been delivered to him sooner; and he also objected to the jurisdiction of the court, and to the form of the accusation, before he pleaded "not guilty." The appellee here made no such objection.

The Supreme Court evidently regarded such objections as not affecting the jurisdiction of the court-martial, because, to again quote from the opinion, "the court-martial having jurisdiction of the person accused

and of the offense charged, and having acted within the scope of its lawful powers, its decision and sentence can not be reviewed or set aside by the civil courts, by writ of *habeas corpus* or otherwise."

In the present court-martial case, it was expressly admitted by the accused, in response to a question by the judge-advocate, that he had received a copy of the charge and specification preferred against him, at 10.30 a. m. on July 1, 1899 (R., 13, 19)—the identical charge and specification upon which he was tried on July 5 following. He stated to the court that he did not desire counsel, and that he did not object to any member of the court; and upon arraignment, after the reading of the charge and specification preferred against him, to each he pleaded "Not guilty." He made no objection whatever at any stage of the proceedings, and he had a full and fair trial by a duly constituted military tribunal. (R., 11–22.)

But without regard to any such small technical points of estoppel we maintain that the following proposition is sound law, namely:

> That where a court-martial has jurisdiction of the person accused, and of the offense charged, and has acted within the scope of its lawful powers, its erroneous rulings, if any, can not be reviewed or set aside by any civil court; and that a neglect or failure on the part of an officer whose duty it was to furnish the accused with a copy of the charge and specification preferred against him, at the time prescribed by the statute (if so prescribed), could not possibly affect the jurisdiction of the court—and *a for-*

> *tiori* when it appeared to the court that the accused had four days before trial been furnished a copy of the charge and specification, and made no objection whatever in respect to the time it was furnished to him.

In other words, even though the interpretation of Article 43 by the court below could be regarded for a moment as a sound one, our contention would still be that neglect or failure to furnish the accused with a true copy of the charge and specification, at any particular time before his trial, would, at most, be merely an error of procedure, and that irregularities of process or procedure either before or during a trial by a court-martial do not oust the jurisdiction of the court.

In this view of the case the main question of law before the court is as to the jurisdiction of the court-martial which tried and sentenced John Smith (the appellee).

In such cases, said Chief Justice Drake, delivering the opinion of the Court of Claims in *Keyes* v. *United States*—a court-martial case—(15 C. Cls. R., 532–541):

> No doctrine is better settled than that judicial proceedings can be assailed or questioned collaterally only when the court in which they occurred was without jurisdiction to take them.

And his honor, the present chief justice of that court, then concurring, said:

> I am of the opinion that when an officer has been removed and his successor appointed and confirmed, this court can not inquire into the legality or regularity of his removal.

Affirming the judgment of that court in that case (109 U. S., 336, 339), Mr. Justice Blatchford, delivering the opinion of the Supreme Court, said:

> It was held by this court in *Blake* v. *United States* (103 U. S., 227) that the President has the power to supersede or remove an officer of the Army by the appointment of another in his place, by and with the advice and consent of the Senate, and that such power was not withdrawn by the provision of § 5 of the act of July 13th, 1866, c. 176, 14 Stat., 92, now embodied in § 1229 of the Revised Statutes, that "no officer in the military or naval service shall, in time of peace, be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof." It was held that this provision did not restrict the power of the President, by and with the advice and consent of the Senate, to displace officers of the Army or Navy by the appointment of others in their places.

The doctrine so stated was held sufficient for the affirmance of the judgment of the Court of Claims, which dismissed the petition in that case. Nevertheless, Mr. Justice Blatchford, answering the contention of counsel that the record of the court-martial must affirmatively show not only jurisdiction, but regularity of proceedings, said:

> That the court-martial, as a general court-martial, had cognizance of the charges made, and had jurisdiction of the person of the appellant, is not disputed. This being so, whatever

> irregularities or errors are alleged to have occurred in the proceedings, the sentence of dismissal must be held valid, when it is questioned in this collateral way. (*Thompson* v. *Tolmie*, 2 Peters, 157; *Voorhees* v. *Bank of United States*, 10 id., 449; *Cornett* v. *Williams*, 20 Wallace, 226, 249.) This doctrine has been applied by this court to the judgment and sentence of a naval general court-martial which was sought to be reviewed on a writ of *habeas corpus*. (*Ex parte Reed*, 100 U. S., 13.)
>
> Where there is no law authorizing the court-martial, or when the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment.

The doctrine there stated is that whatever irregularities or errors are alleged to have occurred *in the proceedings*, 'the sentence of a court-martial must be held valid when it is questioned in a collateral way, if the court-martial had jurisdiction of the accused and of the offense charged against him.' And this doctrine is again affirmed and reaffirmed in *Johnson* v. *Sayre*, 158 U. S., 109, and *Carter* v. *McClaughry*, 183 U. S., 365.

Now, it may be asked, *What irregularities or errors does the word "proceedings" include?* The word is evidently used as a law term, and the Supreme Court at the preceding Term of 1882 furnished a very comprehensive definition. Mr. Justice Miller, delivering the opinion of the court in *Kring* v. *Missouri* (107 U. S., 221, 231), said: "The word 'procedure,' as a law term, is not well understood;" and adopting its definition by

Bishop, "the distinguished writer on criminal law in America," he defined its meaning as follows:

> The term "procedure" is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms—Pleading, Evidence, and Practice. * * * The word [Practice] means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in; and Evidence, he says, signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted.

In *Swaim* v. *United States* (165 U. S., 553, 565) the doctrine is again well reaffirmed that—*Where a court-martial had jurisdiction over the person and the case, its proceedings can not be collaterally impeached for any mere error or irregularity committed within the sphere of its authority.* All of the many errors alleged in that case were alleged errors of procedure (28 C. Cls. R., 216). "These," said the now chief justice of the Court of Claims, "can not be reviewed collaterally;" and in affirming the judgment of the Court of Claims in that case the Supreme Court said that instead of considering the several propositions urged by counsel, "we might well content ourselves with a reference to the able and elaborate opinion of the Court of Claims delivered by Justice Nott."

See *Johnson* v. *Sayre*, 158 U. S., 109, and also *Carter* v. *McClaughry*, 183 U. S., 365, where the rule is "*reit-*

erated" that *civil tribunals will not revise the proceedings of courts-martial, except for the purpose of ascertaining whether they have jurisdiction of the person and of the subject-matter, and whether, though having such jurisdiction, they have exceeded their powers in the sentence pronounced.*

III.

In conclusion, we again say that all that any civil court can do in a court-martial case is limited to questions respecting the jurisdiction of the court-martial. It is well settled that if the latter court has jurisdiction of the person to be tried and of the offense charged against him, the President of the United States alone has final and exclusive appellate power to review its proceedings and set aside its sentence, even when a commissioned officer of the highest rank is sentenced to be dismissed. He is "the court of last resort" (*Carter* v. *McClaughry, supra*, 385).

Speaking for the Supreme Court in *Elliott* v. *Piersol* (1 Pet., 328), Mr. Justice Trimble said:

> When a court has jurisdiction, it has the right to decide every question which occurs in the cause. And whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities. * * * They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers.

Hence the urgent necessity for an appeal in this case.

We do not care to resort to the doctrine of estoppel to escape a judicial determination of the important question presented in this case. In view of the large number of claims for forfeited wages in like naval court-martial suits which are now encumbering the dockets of the Court of Claims and imposing so much irksome and, we think, unnecessary work not only on the court below and counsel for the defendants but also upon the Navy Department, we respectfully suggest that the jurisdiction of the Court of Claims in such cases should now be clearly defined. Until this is done, attempts will be made from time to time by needy solicitors of claims in that court who prowl around our military prisons and seek to instigate contempts in the naval service for military discipline by courts-martial, and of the Commander in Chief himself, by bringing such suits in that court. Therefore, neither the sentences of these military courts, nor the action of the Admiral or the Secretary of the Navy or of the President upon them, should ever be regarded as void by that civil court, except perhaps upon the very clearest jurisdictional grounds when the court-martial case was *coram non judice*. (*Wise* v. *Withers*, 3 Cr., 331, 337.) When general courts-martial are convened by the Secretary of the Navy, or by the commander in chief of a fleet or squadron, in contemplation of law they are convened by the President himself as Commander in Chief of the Navy. (*Wilcox* v. *Jackson*, 13 Pet., 498, 513; *Eliason* v. *United States*,

16 Pet., 291, 302; *Williams* v. *United States*, 1 How., 290, 297.) He alone is "the court of last resort," and all officers and seamen may appeal to him.

As long as this constitutional exclusive jurisdiction of the Commander in Chief is admitted in and respected by the civil judicial courts our Armies and Navies will continue to be—what they always have been—INVINCIBLE.

Respectfully submitted.

LOUIS A. PRADT,
Assistant Attorney-General.

FELIX BRANNIGAN,
Assistant Attorney.

APPENDIX A.

(Referred to on page 9 *ante.*)

UNITED STATES OF AMERICA,
NAVY DEPARTMENT.

I hereby certify that the annexed (original) statement of procedure in the cases of officers and enlisted men of the Navy brought to trial before general courts-martial from the date of initial report of misconduct to arraignment was prepared at the request of the Department of Justice by Captain S. W. B. Diehl, Judge-Advocate-General of the Navy; and that the extracts from the Navy Regulations appended thereto are copies of such regulations as they existed in May, June, and July, 1899.

In testimony whereof I have hereunto set my hand, and caused the seal of the Navy Department of the United States to be affixed, at the city of Washington, this twenty-second day of July, in the year of our Lord one thousand nine hundred and four, and of the independence of the United States the one hundred and twenty-ninth.

[SEAL.] CHAS. H. DARLING,
Acting Secretary.

STATEMENT.

Prepared at the request of the Department of Justice (letter July 11, 1904, Mr. Assistant Attorney-General L. A. Pradt), in response to the following questions:

1. When an enlisted man in the Navy commits an offense, for which he is afterwards tried by a general court-martial, what action is taken

in that matter—step by step—from the date of the offense to the time of the trial, according to the Rules and Regulations and Customs of our Navy?

2. When an officer in the Navy commits an offense, for which he is afterwards tried by a general court-martial, what action is taken in that matter—step by step—according to the Rules and Regulations and Customs of the Navy?

The several steps in the case of a trial by general court-martial, from commission of offense to arraignment for trial, according to practice on board naval vessels to which I have been attached from time to time during the period of my service, 35 years, in the Navy, may be briefly stated as follows:

1. Report of misconduct is made to the captain, usually in the form of a written statement of the circumstances, names of witnesses, and reference to papers, if any, relating to the charge. (Regs., Art. 1073, par. 1.)

2. Personal investigation is made of the report by the captain immediately if the case requires summary action, but in ordinary cases on the following morning. (Regs., Art. 1091, par. 2.)

3. This investigation consists in a hearing "at the mast" (Regs., Art. 1091, par. 1), i. e., at a place on board ship designated for such purpose. The person accused, being summoned "to the mast," is informed of the report against him by the captain, who hears what, if anything, he has to say in denial, explanation, or excuse of the alleged misconduct. (Regs., Art. 1073, par. 2.) Any persons whom the accused wants questioned in his behalf are sent for and interrogated. The person accused being thus made fully acquainted with

the charge against him and his side of the matter being heard, the captain determines whether the case is one that can be disposed of without resort to a general court-martial. (Art. 1073, first clause.)

4. If after such investigation the captain is satisfied that the accused should be brought to trial before a general court martial, a detailed statement of the circumstances under which the offense was committed, with lists of witnesses, papers, including statement of the accused, is transmitted to the Secretary of the Navy or the commander in chief of the fleet or squadron (Article 1076), who alone may convene general courts. (Sec. 1624, R. S., Art. 38.)

5. Pending action by the convening authority, the accused is placed under suspension or in arrest (Article 1076, last clause). While under such suspension or arrest the accused performs no duty. The necessary restraint may be effected by confinement, not solitary, or by placing the accused in irons, or by simply restricting him to certain limits. Such restraint only is imposed as is deemed necessary for safe-keeping (Art. 1089), and during its continuance the accused receives full rations and full pay.

6. If the convening authority decides that a court-martial is necessary, he proceeds at once to prefer charges against the offender and convene a court for his trial (Art. 1102).

7. The charges and specifications are then by the convening authority forwarded to the commanding officer in whose custody the accused is held awaiting trial.

8. The commanding officer, immediately upon receipt of the charges and specifications, causes the accused to be furnished with a copy thereof and notified of the

time and place of trial. In the case of an enlisted man the charges and specifications are usually read aloud to the accused, as well as delivered to him by the officer who is to serve as judge-advocate of the court, and note is made in the log of such action.

9. Up to this time the accused has been held in custody to *await action* by the convening authority. When the charges and specifications are placed in his hands, however, and he is notified of the time and place at which the court will convene, he is considered and treated as in *arrest for trial*, and is so informed.

10. Between the date of the investigation at the mast and the convening of a general court-martial, the accused is sometimes, for convenience, transferred to another vessel or command to await trial. In such case the officer to whose command he is transferred is charged with his safe-keeping, and also with the duty of seeing that he is promptly furnished with a copy of the charges and specifications and notified of the time and place of the trial.

11. The accused thus receives a copy of the charges and specifications some days before the court convenes. The precise number of days is not fixed by regulation or practice and varies according to circumstances.

12. Before arraignment the accused is asked whether he has received a copy of the charges and specifications; if so, when, and whether he is ready for trial. His answers to these inquiries are entered in full in the record of the court.

While the foregoing statement has been drawn with especial reference to the cases of enlisted men brought to trial by general court-martial, the course pursued in the cases of commissioned and warrant officers is substantially the same. The chief differences are that in

the case of officers there is usually no preliminary oral hearing, in lieu of which reports of the alleged offence are made in writing and referred to the accused for such statement, if any, as he may have to make. Officers are placed under suspension or in arrest pending action by the convening authority upon reports against them, and in sufficient restraint to insure their appearance before the court. The precept convening the court is usually accompanied by an order directing that the accused be furnished with a copy of the charges and specifications, and placed in arrest for trial.

Extracts from the regulations governing the foregoing practice, substantially as they existed in May, June, and July, 1899, but for convenience of reference quoted from the current edition, are hereto appended.

Respectfully submitted.

S. W. B. DIEHL,
Judge-Advocate-General.

Extracts from the regulations governing the administration of discipline in the Navy, with particular reference to the prescribed procedure between the commission of an offense and the arraignment of the accused before court-martial.

ART. 1073. (1) In order to avoid unnecessary recourse to courts of inquiry and general courts-martial, it is directed that where an officer or other person shall be reported for grave misconduct to his immediate commanding officer, the latter shall institute a careful inquiry into the circumstances on which the complaint is founded. To this end he shall call upon the complainant for a written statement of the case, together with a list of his witnesses, mentioning where they may be found, and a memorandum of any documentary evidence bearing upon the case which it may be in his power to produce.

(2) He shall also call upon the accused for such counter statement or explanation as he may wish to make, and for a list of the persons he desires to have questioned in his behalf. (Art. 1033, Regs., 1896.)

ART. 1076. If, upon such investigation, the commanding officer shall be satisfied that the charge is such as to call for judical action, he shall transmit to the Secretary of the Navy, or to the commander in chief of the fleet or squadron, as the case may require, a particular statement of the misconduct with which the accused is charged, embracing such detail of the circumstances and of the time and place at which they occurred, with lists of witnesses and statement of the accused, as may enable the convening authority to decide upon the propriety and expediency of ordering a court, and to frame charges and specifications should it be ordered. Under such circumstances the accused may be continued under suspension or arrest to await the decision of the convening authority. (Art. 1037, Regs., 1896.)

ART. 1077. (1) Should the decision of the Secretary or commander in chief be that no trial is to take place, the accused shall be at once released and restored to duty. But if it be decided that the accused shall be brought to trial, the court shall be assembled for that purpose as soon as the nature of the case and the interests of the public service will allow, unless, meanwhile, such information or explanation shall reach the convening authority as to make it advisable to withdraw the charges and restore the accused to duty. (Art. 1038, Regs., 1896.)

ART. 1078. Whenever an accusation is made against an officer, either by report or by indorsement upon a communication, a copy of such report or indorsement shall be furnished at the time to the officer accused. (Art. 1039, Regs. 1896.)

ART. 1084. No officer placed under suspension or arrest shall be confined to his room or restrained from the proper use of any part of the ship to which, before his suspension or arrest, he had a right, except the

quarter-deck, poop, and bridges, unless such confinement or restraint shall be necessary for the safety of the ship or the preservation of good order and discipline; and neither the confinement nor the additional restraint shall be imposed for any longer time than shall be absolutely necessary. (Art. 1045, Regs. 1896.)

ART. 1087. The authority to punish offenses being strictly defined by law, no deviation from the limits prescribed will be tolerated. (Art. 1048, Regs. 1896.)

ART. 1088. Captains of ships only are empowered by law to inflict punishment of their own authority; and they are not empowered to impose upon persons under their command any other punishment than those precribed in Art. 24 of the Articles for the Government of the Navy, except in pursuance of the sentence of a general or summary court-martial. (Art. 1049, Regs. 1896.)

ART. 1089. When any enlisted person is confined for a longer time than ten days to await trial by court-martial, the captain shall keep in view the fact that this confinement is protracted simply to insure the appearance of the prisoner before the court by which he is to be tried. He should not, therefore, be subjected to greater rigor than is necessary to effect that object. (Art. 1050, Regs. 1896.)

ART. 1091. (1) All reports of misconduct shall be investigated by the captain before punishment is adjudged. At morning inspection he shall be furnished by the executive officer with a list of persons reported for offenses during the preceding day. After inquiring into the facts in each case *at the mast*, giving to both accuser and accused an impartial hearing, he shall assign a punishment when necessary and affix his signature in the report book.

* * * * *

(3) The investigation of a report, except where summary action is deemed necessary, shall be deferred until the morning following the day on which the report is made; but longer delay shall be avoided. (Art. 1052, Regs. 1896.)

ART. 1102. If, in the opinion of the commander in chief or senior officer present, a trial by court-martial is necessary, and the alleged wrong shall have occurred within the waters of the United States, he shall submit a succinct report of the case, together with all the correspondence relating thereto, to the Secretary of the Navy, unless, as commander in chief of a fleet or squadron within the waters of the United States, he be expressly authorized by the President to order courts-martial. Officers empowered to order courts-martial will in such case proceed at once to prefer charges against the offender and convene a court for his trial. (Art. 1064, Regs. 1896.)

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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, APPELLANT,
v.
JOHN SMITH. } No. 184.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTARY BRIEF FOR THE UNITED STATES.

LOUIS A. PRADT,
Assistant Attorney-General.

E. P. HANNA,
Solicitor, J. A. G. O., Navy Department.

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APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTARY BRIEF FOR THE UNITED STATES.

Pursuant to the wishes of the Secretary of the Navy, this additional brief, relating especially to the proceedings in navy courts-martial, has been prepared by the Solicitor of the Navy Department.

The present appeal brings before this court the record of an ordinary naval court-martial. That record is set out in full in the findings of fact made by the court below. It is not a selected record, is brief, and in itself discloses nothing especially interesting or unusual.

There is no contention in this case that the person accused did not commit the offense charged, or that he

was too severely punished. An inspection of the record shows that no such contention could stand for a moment. There is here no question of righting a wrong. The accused substantially admitted his guilt in his written statement to the court-martial, and aside from such admission the facts set forth in the specification were conclusively established by the testimony adduced. (Transcript of record, pp. 13–15.)

The decision of the Court of Claims in favor of the appellee does not, therefore, turn upon the question of his guilt or innocence, or the adequacy of his punishment; it does not touch the merits of the matter; it merely declares that a statute directing what should be done at a particular stage of the proceedings was not observed, as the Court of Claims reads that statute; and that consequently the court-martial was without jurisdiction.

The statute in question is article 43 of the articles for the government of the Navy (section 1624, R. S.), and contains this clause:

> The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest.

The phrase "at the time he is put under arrest" has always been understood by the Navy to refer to arrest for trial, but the Court of Claims holds in effect that it means the arrest to which the accused is subjected when taken into custody immediately upon the commission or discovery of the offense, or upon his surrender, if such surrender takes place, or upon his

capture if he had escaped. Further, because John Smith, the person accused in the matter on appeal, was not furnished with a copy of the charges, with the specifications, at the time when, upon commission of the offense, he was taken into custody, the Court of Claims has declared that the naval general court-martial was in this case without jurisdiction, has pronounced its proceedings to be null and void, and has decreed that the fines imposed by such court be refunded by the United States. It is proper to state that this decision was rendered by a divided court, Mr. Justice Peelle dissenting. (Transcript of record, p. 8.)

The grounds upon which this appeal is taken are several. They are fully presented in the principal printed brief for the Government.

From the standpoint of naval administration we find the results that must follow the decision rendered by the Court of Claims in this case to be of such grave consequence that we ask the indulgence of this court, in order that we may lay before it for consideration some features of the matter deemed necessary to be taken into account in dealing with this statute, if its true meaning is to be ascertained.

The officers charged with the administration of this statute have in practice treated the word "arrest," as used in article 43, as meaning "arrest for trial." The practice has been entirely uniform. It has prevailed for more than forty years. If, after such long period, the true meaning of this provision has at last been found, it seems to follow that fines, in large

amount, have been illegally imposed by naval courts and collected by the United States, and that such moneys should be refunded. Furthermore, officers have been dismissed and men dishonorably discharged from the service; officers now on the active list have been reduced in rank, and others correspondingly advanced; and officers and men have been confined in naval prisons and in State penitentiaries at hard labor, all without warrant of law.

If the Court of Claims is right in this matter the naval prisons at Boston and Mare Island will and ought to be speedily emptied, and naval prisoners at the State penitentiaries at San Quentin and Wethersfield will and ought to be promptly released. Assuredly, men confined there should not be held for one moment if this court should conclude that the tribunals that sent them to prison were without jurisdiction, and the sentences imposed illegal, null, and void.

The Court of Claims appreciated the gravity of its ruling in this matter. In its last action (an order overruling a motion to set aside and dismiss—transcript of record, p. 28), that court said:

> This case has been twice elaborately argued and carefully considered (36 C. Cls. R., 304; 38 ibid.), to wit, when it was determined upon demurrer and upon the evidence. The record states with unusual fullness and clearness every fact which will enable the Supreme Court to pass upon the questions of law involved. The amount involved in this case is trivial, but *the questions of law presented by it are of very grave importance.*

HISTORY OF THE CASE.

On the 26th of May, 1899, the U. S. S. *Yorktown*, one of the vessels of the Asiatic squadron, was at anchor in Iloilo Harbor, Philippine Islands. Serving on board that vessel at the time was a fireman of the first class, John Smith by name, who, being the next man for duty, was ordered to take the watch from 12 to 4 p. m. This order he refused to obey. A question of discipline was thus presented. (Transcript of record, p. 15.) Refusal to obey orders is a serious matter in any military organization. It is, therefore, the practice in our Navy, before treating the offense as such, to make sure that the order is clearly understood, and that the refusal is intentional and deliberate. The record (transcript of record, p. 15, q. 8) shows that this was done in Smith's case. The order, first given by the chief machinist, a petty officer, was presently repeated by the senior engineer officer on duty. Smith again, and positively, refused to obey.

The facts were then reported to the captain, who, it is assumed and not controverted, gave Smith the preliminary hearing at the mast prescribed by the regulations (Then article 1035, now article 1073, United States Navy Regulations, brief, p. 29. See particularly statement by the Judge-Advocate-General of the Navy showing the practice in this particular step by step from commission of the offense to time of trial, Appendix A, p. 26.)

At the mast a man is informed of the reports against him. The witnesses are named, and he is given an

opportunity, but not ordered, to make explanation or denial. In this case the record shows that Smith knew just what his offense was, and that he intended to commit it. His reason for refusing to obey the order was that he thought too much duty was being required of him. He had been on duty four hours on watch from 4 a. m. to 8, and after that four hours at work from 8 a. m. to 12, and he was ordered to take the watch from 12 to 4. This he thought was too much. That is his side of the story. (See his statement, transcript of record, p. 19.) The other side is that the ship was in port; that some of the men were on liberty (transcript of record, p. 14); that the ship's duty had to be done by those who were left; and that all alike, if deserving, would in turn share in the benefits of this arrangement.

The chaos that would result in any military organization if enlisted men were permitted to judge whether they ought to obey an order or not, before doing so, need not be discussed. Smith's judgment in such a matter is to some degree discredited by the fact that his conduct record was low under the heading of "sobriety," and zero under the heading of "obedience." Within a year he had been in confinement thirty days on bread and water with loss of one month's pay, for insolence to the officer of the deck. (Transcript of record, p. 21.)

Just what took place at the preliminary hearing at the mast we do not know. A mast hearing is not a court, and what is said and done there is not set down in writing. It is assumed that, as there was no justifi-

cation for his conduct, Smith's explanation was unsatisfactory.

The next step in the case is shown by the log book of the *Yorktown*. The commanding officer directed that Smith be put "under sentries as a prisoner in single irons for safe-keeping to await trial by general court-martial."

Right at this point, according to the Court of Claims, John Smith should have been "furnished with a true copy of the charges with the specifications." The situation presents a good example of the value of what has been called "the contemporaneous construction of a statute by officers charged with that duty." The captain of the *Yorktown*, on the spot and obliged to act, looks at the statute from a different point of view from that occupied by the Court of Claims. He is in the vivid presence of the conditions for which article 43 and other statutes on this subject were enacted. He has no charges and specifications duly drawn up and ready to deliver to the accused. In the nature of things that was impossible. It is no part of his duty to draw such papers. If he did so he might make a mistake, and a mistake here, under the decision of the Court of Claims, is fatal. It would be as bad to deliver the wrong charges and specifications as to deliver none. The captain has no right to usurp the functions or hamper the discretion of higher authority, and it is to higher authority that the law (article 38) jealously reserves the power to convene general courts-martial.

Smith's offense was a general court-martial offense;

and accordingly the captain, exercising his powers under article 24, held the accused in custody to await orders from the commander in chief.

What else could he do? Discipline had been defied, and discipline is the vital air of a ship of war. The offender must either be taken into custody or left at large to mingle with the crew, and, it might be, to cause further trouble or, perchance, effect his own escape. To an officer of the Navy trained in traditions of discipline, accustomed to regard obedience to lawful orders as above all considerations of personal comfort and convenience, as paramount even to personal safety or life itself on occasion; to a commanding officer charged, as in this instance, with important independent duty and responsible for the efficiency and honor of an American fighting ship, such a course, naturally, would not suggest itself, and probably never has been entertained as a possibility. Accordingly, the commander of the *Yorktown* put John Smith, fireman, not in close confinement, as the court below seems to assume, but "*under sentries* in single irons, to wait trial by general court-martial."

This was in accordance with immemorial usage extending through the entire history of our own Navy and traceable beyond that to the practice of Great Britain. Article 5 of the regulations and instructions relating to His Majesty's service at sea, published in 1772 (p. 46), reads in part:

> The captain is never by his own authority to discharge a man or warrant officer, nor to punish

> or strike him; but if any are *disobedient to command* * * * he may suspend or *confine* them, *and when he comes in the way of a commander in chief apply to him for holding a court-martial.*

This is affirmed in almost identical language in the rules for the regulation of the Navy of the United Colonies passed November 28, 1775. See also "An act for the government of the Navy," approved March 2, 1799 (1 Stats., 709); and general regulations for the Navy and Marine Corps of the United States, 1841, published by the Navy Department, articles 479 and 482. American Archives, Vol. III, 1775, fourth series, page 1930.

So the commanding officer of the *Yorktown*, surely with every wish to obey the law, but reading the statute in his uniform and on the spot, in the light of naval traditions, usages, customs, and regulations, and having upon him not one only, but all responsibilities of command, did not at this point undertake to furnish the accused with the charges and specifications, as the Court of Claims says he should have done, but instead caused him to be held, under guard, to await action by higher authority. Right, according to the Navy Regulations (article 1077, Regulations, last clause, transcript of record, p. 30), was he wrong according to the letter of the statute?

THE LETTER OF THE STATUTE.

The court below rules that "the statute means what it says." (Transcript of record, p. 24.) What does it

say? "The accused shall be *furnished* with a *true copy* of the charges." This does not mean that he is to be informed orally, but he is to be "furnished" with something. A rough memorandum will not meet this requirement. It calls for a *true copy*. The charges must therefore be put in writing, and sufficient time to do this allowed. Further, he must be furnished with a true copy of the charges, *with the specifications*. These words are so full of meaning that, alone, they would seem sufficient to sustain the naval practice. It would be hard to find a phrase that speaks more surely of careful inquiry into the precise character, quality, and degree of the offense, or of painstaking care in preparation, than the words "the charges, with the specifications." The phrase is a term of art. It is language of precision. It suggests to the mind a criminal indictment, to which, indeed, the charges and specifications are analogous. (Transcript of record, p. 7.) Such an indictment is not framed in a moment, or an hour; seldom in a day. It involves preliminary hearing and investigation, and necessarily some lapse of time. Charges and specifications are not carried about, ready made, to be handed over to every person accused at the time he is put under arrest, if by arrest is meant apprehension when the hand of justice is first laid upon the offender. Each word used in this provision, "a true copy of the charges, with the specifications," more than indicates, it imports, that the arrest meant is not any preliminary arrest, but an arrest taking place some time thereafter, i. e., the arrest for trial.

Carrying examination of the letter of this statute a step further, we find that it refers to grave offenses only. The words are, the *charges with the specifications*. That means a general court-martial. Naval offenders may be punished by three instrumentalities. First, for minor offenses, by the commanding officer directly, under article 24; second, for more serious offenses, by summary court-martial, under article 30; third, for grave offenses, by general court-martial, under article 38.

In the case of the first, charges and specifications are not used. The commanding officer simply exercises what is left to him of his ancient prerogatives, and punishes directly. In the case of summary courts there is no such thing as a charge; the charges and specifications are blended in one or more specifications. It is to general courts only that the term "charges and specifications" applies. This statute, therefore, by its express terms refers to general courts, which may be convened only by the President, by the Secretary of the Navy, or by a commander in chief. These authorities can not be assumed to be present or immediately accessible when offenders are put under arrest. All this tends to confirm the conclusion that this requirement relates to arrest for trial and not to any preliminary arrest.

Again, as this statute by its letter has to do with serious military offenses only, can it be supposed to mean that offenders who may have committed almost any grave crime on the calendar, are to go at large

pending the preparation of charges and specifications? Is a man who is drunk and disorderly, insolent, insubordinate, mutinous; a man who has committed an assault, manslaughter or murder, not to be arrested until the commander in chief, who may be a thousand miles away, or the Secretary of the Navy, who may be ten thousand miles away, can be reached? Is a deserter whose whereabouts are suddenly discovered to be permitted to go at large, pending such communication with higher authority? These questions appear to answer themselves when it is remembered that we are dealing with a military organization. (*United States* v. *Clark*, Fed. Rep., vol. 31, p. 713.)

Still examining the letter of the statute, we find that the language is "*at the time* he is put under arrest," not on the same day, but at the time. Under the naval interpretation, the use of the word "time" instead of "day" is intelligible. It is precise. The delivery of the charges and specifications is always contemporaneous with "arrest for trial." Such arrest is usually, but not always, formal in the case of an officer, and is usually, but not always, constructive) that is, it is effected by the act of delivery of charges and specifications) in the case of an enlisted man. The use of the words "*at the time*" are very significant here, since it is physically impossible in most cases, under any theory of this statute, to deliver to the person accused the charges and specifications at the time, that is, at the very moment of his original arrest, while this may be, and in practice always is, done at the time of arrest for trial.

This statute, from its nature, has usually been administered by officers in local command, afloat or ashore. They have all, in like cases, done as the commander of the *Yorktown* did. Doubtless the construction adopted by the court below never occurred to any of them. The very letter of the law would probably have satisfied them, if the question ever arose, that "arrest for trial" was the true and only reasonable meaning. This is "what the law says," as they read it. So much as to the letter of the statute.

The *Yorktown*, with the accused on board, remained at Iloilo until June 27, on which date she left for Manila. June 29, at 3.50, as the log shows, the vessel "anchored off the flagship *Baltimore* at Manila." Rear Admiral Watson, commander in chief United States naval forces on Asiatic station being then present, the court was convened without delay. Under the authority vested in him by article 38, section 1624 of the Revised Statutes, Admiral Watson, June 30, 1899, convened a general court-martial, and (transcript of record, pp. 17 and 18) forwarded to such court "charge with specification against John Smith, fireman first class." Smith was at once placed in double irons for safe-keeping, and the charge and specification were read to him. This effected a change in his status. *This was the arrest meant by the first clause of article 43.* If he had been an officer it would have been signified by the surrender of his sword. In Smith's case such arrest was marked only by a more rigorous restraint and by delivery of the charge with the specification.

Four days later, at 10 a. m., July 5, 1899, the court assembled. The accused in reply to an inquiry by the judge-advocate, in open court, stated that he had received a copy of the charges with the specifications preferred against him, 10.30 a. m. July 1, 1899, and that he was ready for trial.

The evidence was brief and to the point, and left no doubt as to the guilt of the accused. In his statement to the court (transcript of record, p. 19) Smith says that he felt the order was an injustice to him, and adds:

> It was my intention, *when I refused to take the watch*, to see the commanding officer and protest against what I considered this injustice to me, but I became excited and said more than I intended. *I realized afterwards that I should have obeyed the order first and then appealed* to the commanding officer.
>
> I beg the court, in adjudging my case, to take into consideration the excitement under which I was at the time, and the extra amount of work required of me.

After this statement, and in view of the testimony, there was nothing to do but to find the accused guilty, and in consideration of the circumstances to give him a moderate sentence. This the court did. The maximum sentence for the offense of "refusing to obey the lawful order of a superior officer" (article 63, Articles for the Government of the Navy, Navy Regulations, 1900, pp. 486–487) is, in the case of an enlisted man, "confinement for two years and dishonorable discharge." The court gave Smith one year.

The record was approved by the commander in chief July 7, 1899. (Transcript of record, p. 17.) It was forwarded to the Department in due course, and was carefully examined there. The usual general court-martial order (No. 75–1899) was issued, and, as a first act in the direction of clemency, the period of confinement was made to take effect from July 7, 1899, the date of approval of the sentence. (Transcript of record, p. 22.) All records of general and summary courts-martial, wheresoever held, are thus carefully reviewed under the direction of the Secretary of the Navy. This review is a lawful procedure, which amounts practically to appellate supervision. Without the approval of the convening authority no sentence of a court-martial can be carried out. Undoubtedly such reviewing authority, "in passing upon the sentence of a court-martial and giving to it the approval without which it can not be executed, *acts judicially*." (*Runkle* v. *United States*, 122 U. S., 543–555–558.)

Smith arrived at Mare Island August 31, 1899. Subsequently, by letter dated January 30, 1900, to the commandant, the Department, upon the recommendation of the Judge-Advocate-General, remitted the last five months of his term of confinement. He was therefore actually confined at the Mare Island prison less than six months, and his confinement under this sentence, from July 7, 1899, to date of release, was about seven months. If we add thereto the time he spent under sentries before trial, the total consequences of his offense involved for him but little more

than eight month's confinement. Does not the history of this case indicate that the naval authorities were guarding the interests of the accused, as well as those of the service, with scrupulous impartiality?

With his discharge from the Mare Island prison, the "John Smith" of these proceedings disappeared. So far as the records show, he has never been seen or heard from since that event.

When the case was taken to the Court of Claims it was first heard upon demurrer, raising the question of the jurisdiction of that court over the proceedings of the court-martial. The Court of Claims held, however (Mr. Justice Peelle dissenting), that it ought to take jurisdiction of the case, and did so. It appears from an examination of the ruling upon demurrer (transcript of record, p. 6) that the court assumed that the claimant was not furnished with a copy of the charges *at any time* before the trial. This inference was, of course, erroneous. If such had been the fact, the case would never have reached the Court of Claims. It would have been set aside by the convening authority or by the Secretary of the Navy. Such a defect would have been fatal.

Afterwards, upon the facts, the majority of the court (Mr. Justice Peelle again dissenting), pronounced the court-martial proceedings a nullity. The only question then considered was, as the court expressly says (transcript of record, p. 23), "whether a seaman arrested on board his ship at Iloilo, P. I., on the 26th day of May, can be kept in close confinement and carried

to Cavite, P. I., and not be made acquainted with the charges preferred against him until the 1st of July following." As a matter of fact Smith was not kept in "close confinement;" and, as the record shows, he was acquainted with the charges against him from the very first. He had them in writing four days before the trial.

It is not the business of Executive authority to make the laws nor, in the last resort, to interpret them. Under certain circumstances, however, the head of a Department may ask the advice of the Attorney-General upon a pending question of law. The question at issue was raised in 1890 by the same attorney who has since brought it up in the Court of Claims. The Navy Department was then advised in the matter by the Attorney-General (19 Op., 472, syllabus) as follows:

> That there may be two arrests, namely, (1) an arrest in an emergency, or upon discovery of the alleged wrongdoing, with a view to a preliminary examination, and, if necessary, the formulation and specification of charges; (2) an arrest for trial: held, further, that article 43 in the provision declaring that "the person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest," has reference to the arrest for trial, and not to the arrest in the first instance.

The naval theory of this statute has always been that, as so clearly stated by the Attorney-General, the first arrest is not what is meant by article 43.

If, however, that article does refer to the preliminary arrest—and conceding this for the moment—we urge that the clause is directory merely; that it ought to be observed, and that the officers failing to observe it may be guilty of neglect of duty; but that such a failure does not undermine and render nugatory all that follows. The most that can be said of such a provision is that it fixes the time when a certain thing should be done. If it is done afterward, and in time to save all substantial rights, there is no serious harm. The omission in such case "is not a disregard of the essence of the matter," in the sense in which those words are used in *Dynes* v. *Hoover* (20 Howard, 65–82). The precise time of the delivery of charges and specifications to the accused has nothing to do with the convening of the court, its organization, or its jurisdiction.

We are confirmed in this view by the decision of this court with regard to a like preliminary statutory requirement, that relating to the oath to be taken by the judge-advocate.

Article 85 of the Articles of War (Army, section 1342, R. S.) prescribes that the judge-advocate of an army court-martial shall be sworn. It goes further and gives the precise language in which the oath shall be administered. In the case of General Swaim this statutory requirement was not observed. (*Swaim* v. *The United States*, 165 U. S., p. 561.) The objection that the judge-advocate had not been sworn being, with other matters, under consideration, this court said:

> It was the opinion of the Court of Claims that the errors so assigned could not be reviewed collaterally, and that *they did not affect the legality* of the sentence; and in so holding we think that court followed the authorities. *Such questions are merely those of procedure*, etc.

Again, article 43 is, as the court below says, a provision of law intended for the benefit of the accused. (Transcript of record, p. 24.) In this case the accused waived its strict observance by accepting the charges and specifications four days before the trial, which was really in ample time for his purposes; by going to trial without objection; and by declaring affirmatively in open court that he was ready for trial. We understand that a person accused can not by waiver confer jurisdiction where it does not exist, but we believe that he may waive a minor statutory provision of this character intended for his own benefit. Who can say that it was not to his advantage to do so?

In *McClaughry* v. *Deming* (186 U. S., 49–66) it was found that a military court had been convened from a class of officers not legally authorized to sit; no more authorized to do so than "a like number of civilians or of women." The accused could not by any action or waiver make such an assemblage a lawful military court. As this court said, "It was not a mere *consent to waive some statutory provision in his favor which, if waived, permitted the court to proceed.*" (186 U. S., 66.) In the case on appeal, however, Smith's action was

precisely that. The naval court was lawfully constituted; had jurisdiction of the person and the case, and if Smith chose to accept the charges and specifications a little later he had a right to do so. If Smith could legally waive this requirement it is clear from the record that he did so. The naval court was not, therefore, under any construction of article 43, ousted of jurisdiction.

The question upon which this case turns has been here discussed as if it were new, open, and undetermined. This has been done out of deference to the distinguished tribunal from which this appeal is taken. But for that decision we should say that the question is not new, that it is not open, and that it has been definitely and finally determined by this court in the case of *Johnson* v. *Sayre* (158 U. S., 109). But for the decision of the Court of Claims, and if this question had elsewhere arisen, we should have used no words to discuss or dispose of it, except those employed by this tribunal in the case of Sayre.

Sayre was a paymaster's clerk in the Navy, on duty on board the receiving ship *Franklin*, at Norfolk, Va. October 10, 1894, he was *put under arrest* to await the investigation of a charge of embezzlement, and was thereafter held in custody. (Statement of the case, *Johnson* v. *Sayre*, 158 U. S., p. 110.)

He was not furnished with the charges and specifications at the time of this arrest. On the 25th of October, fifteen days after Sayre's arrest, the Secretary of

the Navy ordered a general court-martial to convene at the navy-yard in Norfolk for his trial. On the following day, "October 26, a copy of the charge and specification was delivered to Sayre."

The court-martial met October 30. In Sayre's case a court of inquiry had been held because it was necessary to examine the paymaster's books and accounts, and ascertain facts, before the Secretary of the Navy could determine whether or not a court-martial should be convened, or intelligently frame charges and specifications. A court of inquiry is merely one of many means that may be used by the convening authority to discover the facts when charges are under consideration. Whether the convening authority ascertains the facts by the aid of such a court, or through ordinary official channels of inquiry, or determines to act upon the case presented by the papers directly, is immaterial, so far as the question at issue is concerned.

There was no court of inquiry in Smith's case, none being needed. The convening authority was the commander in chief instead of the Secretary of the Navy. The court below was the Court of Claims, instead of the United States circuit court for the eastern district of Virginia. Sayre raised the question under article 43 at the court-martial instead of in the Court of Claims. So far as we are aware, these are the only differences between the two cases, and no one of them touches any vital point.

Omitting irrelevant words, the decision of this court in *Johnson* v. *Sayre* may be fitted to the present case

by simply substituting the name of Smith for that of Sayre, and making appropriate change in the convening authority. That decision contains the following paragraphs:

> The provision of article 43 of the Articles for the Government of the Navy, which prescribes that "the person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest" (on which Sayre relied before the court-martial, and in this court), evidently refers, as appears by the very next article, to the time when he "is arrested for trial" by court-martial, and not to the time of any previous arrest, either by way of punishment or to await the action of a court of inquiry. * * * Sayre, being already in custody to await the result of a court of inquiry, could not be considered as put under arrest for trial by court-martial before the Secretary of the Navy had informed him of the report of the court of inquiry and had ordeerd a court-martial to convene to try him. Immediately after that, and four days before the court-martial met, he was furnished with a copy of the charge and specification on which he was to be tried. This was a sufficient compliance with the article in question.

If this does not finally dispose of the matter now on appeal, so far as article 43 is concerned, we do not know what language the court could use that would do so.

But the court goes further, adding:

> And it is, at the least, doubtful whether the objection that it had not been sooner delivered to him did not come too late, after he had admitted before the court-martial that he had received a copy of the charge and specification, and after * * * he had pleaded not guilty, and the evidence for the United States had been introduced.
>
> The court-martial having jurisdiction of the person accused and of the offense charged, and having acted within the scope of its lawful powers, its decision and sentence can not be reviewed or set aside by the civil courts, by writ of habeas corpus or otherwise. * * * Order reversed, with directions to remand Sayre to custody.

LOUIS A. PRADT,
Assistant Attorney-General.

E. P. HANNA,
Solicitor, J. A. G. O., Navy Department.

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MAR 1 1905
JAMES H. MCKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, APPELLANT,
v.
JOHN SMITH.
No. 184.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR APPELLANT.

LOUIS A. FRANT,
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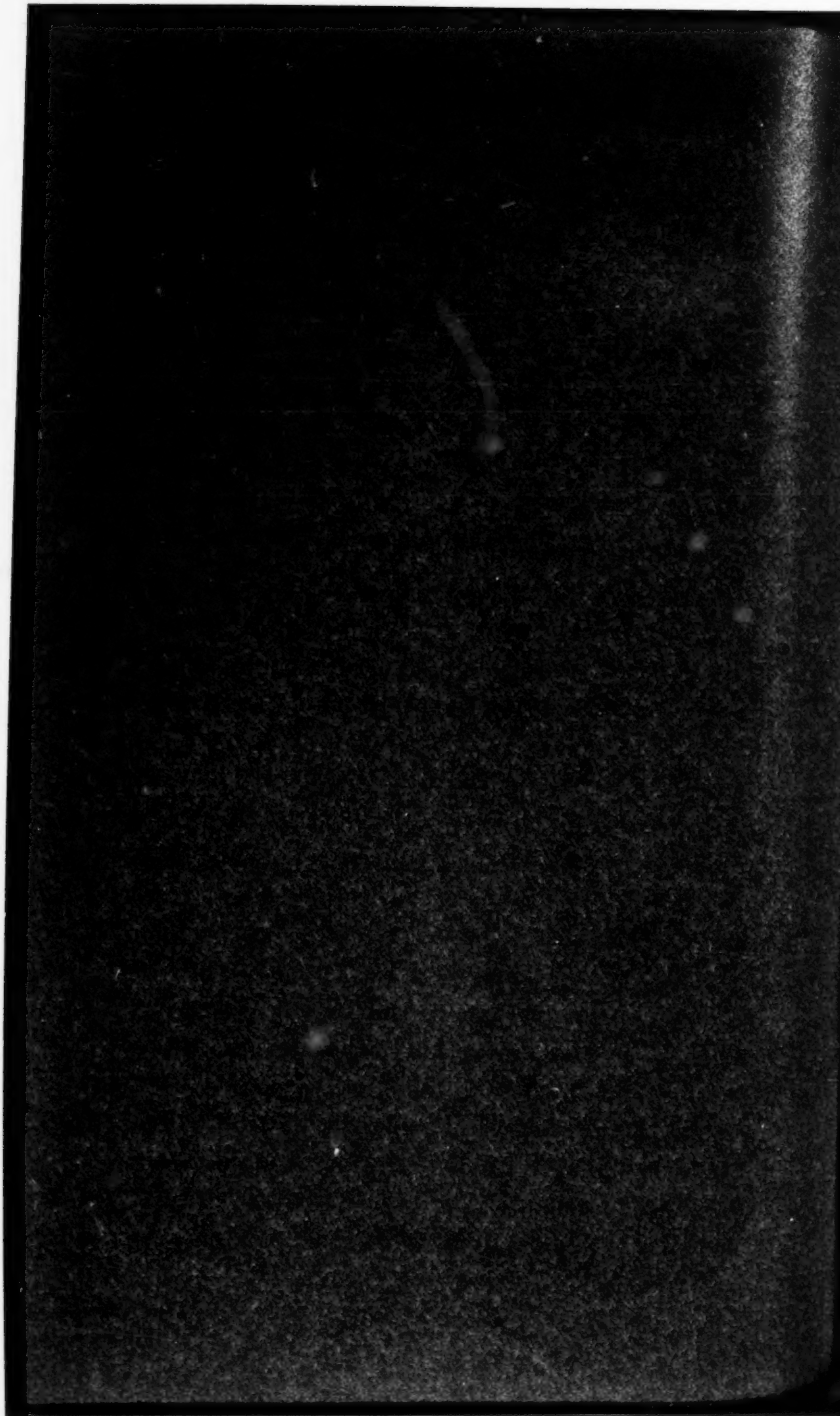

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REPLY BRIEF FOR APPELLANT.

At this late day it is contended for the first time, on behalf of the claimant, that the court martial in this case was without jurisdiction because convened in violation of the inhibition of article 38 of the Articles for the Government of the Navy, that no commander of a fleet or squadron in the waters of the United States shall convene a general court-martial without express authority from the President. In the light of the facts surrounding the convening of this court-martial it is perfectly evident that this objection is absolutely technical and has no foundation whatever upon the plain spirit and intent of the article invoked. This court-martial was convened at Cavite, P. I., June 30, 1899. At the time there was probably no spot at which a fleet or squadron of the United States Navy was or could be assembled, more remote from the President of the United States. Less than three months before, those waters were foreign. At the

time that the court-martial was convened they were the waters, to be sure, of territory of the United States, but territory which was rife with insurrection against the authority of the United States and overrun with the armed forces of that insurrection. Every substantial reason for the convening of the court-martial by the commander of the fleet without express authority from the President existed then that would have existed if it had been convened three months earlier; nor was it called in ignorance of the provisions of article 38, but with express reference to and upon the authority of that article. Its action was ratified by the Secretary of the Navy with full knowledge, of course, that it had been convened without such authority of the President. And the question now raised by the claimant is whether such action of the commander of the fleet and of the Navy Department is to be sustained by this court as being in substantial compliance with the spirit and purpose of article 38, or whether that action is to be declared null and void for lack of the express authority of the President.

I have no hesitation in asserting that this court will not so declare unless there is no escape from the conclusion that the waters of Cavite were at the time *waters of the United States* within the unequivocal meaning of those words as employed in article 38. To my mind it is clear that they were not.

This article was enacted in 1862 at a time when the "waters of the United States" were purely continental and the phrase then meant home waters as contradistinguished from waters beyond seas. The reason for

the enactment is obvious. It gave, by implication, to the commander of a fleet or squadron, as a matter of convenience, and indeed at times of necessity, the right to convene a court-martial when outside of those waters of the immediate shores of the United States from which the President could be conveniently reached, but reserved that right as an exercise of high prerogative to the President in cases where such practical considerations were not involved. These are facts which we have a right to consider in a case like this, where the meaning of the language of the statute is involved. In *Smith* v. *Townsend* (148 U. S., 494–495), Mr. Justice Brewer makes the following quotation most pertinent to this case:

> In endeavoring to ascertain what the Congress of 1862 intended we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances. (*Platt* v. *The Union Pac. R. R.*, 99 U. S., 64.)

In the case of *Hadden* v. *Collector* (5th Wallace, pp. 112–113) this court held that the term "beyond the Cape of Good Hope" was descriptive of the locality of countries with reference to the position of the lawmakers at the National Capital, and hence would apply to imports brought into the port of San Francisco from Persia, although with reference to San Francisco, Persia is not beyond the Cape of Good Hope. There seems to be equal reason in this case to hold that the phrase "waters of the United States" in

article 38 refers to what were then the waters of the United States, or waters of territory immediately adjoining the United States as then constituted which might be thereafter added to it, and should not be now construed to mean waters of subsequently acquired possessions of the United States lying thousands of miles away from the nearest shores of the United States as then constituted. And this is the view which Congress has taken of what may be called another aspect of this question.

The act of May 26, 1900, provided for a 10 per cent increase of the pay of officers serving in Porto Rico, Cuba, Philippine Islands, Hawaii, and the Territory of Alaska above their pay proper. Congress in making appropriation, March 2, 1901, for this increased pay did so in the following language: "For additional 10 per centum increase of pay of officers serving at foreign stations" (31 Stat. L., p. 903), and similar language was employed in the army appropriation acts of June 30, 1902 (32 Stat. L., p. 507), and March 2, 1903 (32 Stat. L., p. 933).

A similar question was raised in the case of *William M. Irwin* v. *The United States* (38 C. Cls. R., p. 87). In that case the court had before it for construction the phrase "beyond seas" in the *further proviso* of section 13 of the navy personnel act, which reads:

> That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places.

The court held that the act of May 26, 1900, providing for a 10 per cent increase of the pay of officers of the Army serving in our island possessions and the Territory of Alaska above their pay proper, taken in connection with the proviso above cited, operated to the like benefit of officers of the Navy detailed for shore duty in our island possessions and the Territory of Alaska. In so holding the court construed the words "beyond seas" to include the waters of our island possessions and of Alaska, thereby overruling the construction of the Comptroller of the Treasury that the phrase applied only to foreign waters. In delivering the opinion of the court Mr. Justice Howry said:

> It does not seem to us reasonable to say that Congress intended to give this increase to naval officers serving in Cuba, at our very doors, and to withhold it from those serving thousands of miles off in the Philippine Islands (p. 99).

Paraphrasing this language, it may be said with equal force in this case that Congress did not intend by article 38 any such incongruity as that a commander of a United States fleet in the waters of Cuba should have the power to convene a general court-martial denied to a commander of a fleet in the waters of Guam or the Philippines. The same view is expressed by this court in the case of the *United States* v. *Thomas* (195, U. S., p. 418), in which Mr. Justice Brown, speaking for the court, after quoting the act of May 26, 1900, above referred to, said:

> Here is an increase of 10 per cent allowed to

> army officers serving in certain designated places. Doubtless if naval officers were detailed for shore duty in any of these islands, they would receive a like increase of pay, under the proviso of section 13 of the personnel act heretofore quoted.

But finally, the case of *Downes* v. *Bidwell* (182 U. S., 244) seems to effectually dispose of this contention by deciding that the island of Porto Rico is not a part of the United States within that provision of the Constitution which declares that all duties, imposts, and excises shall be uniform throughout the United States. In delivering the majority opinion of the court in this case, Mr. Justice Brown, referring to the articles of Confederation, the act creating the northwest territory, and the Constitution of the United States, said:

> It is sufficient to observe in relation to these three fundamental instruments that it can nowhere be inferred that the territories were considered a part of the United States.

If our island possessions are not a part of the United States within the meaning of the uniformity provision of the Constitution, *a fortiori* their waters are not waters of the United States within the meaning of article 38, especially when to extend to them the inhibition of article 38 would be to subvert the very spirit and purpose of that article.

LOUIS A. PRADT,
Assistant Attorney-General.

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THE UNITED STATES, APPELLANT,

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BRIEF ON BEHALF OF APPELLEE.

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BRIEF ON BEHALF OF APPELLEE.

PRELIMINARY STATEMENT.

The United States appeals from a judgment of the Court of Claims for $376 in favor of John Smith, who was the petitioner or claimant in the court below.

Smith, the claimant, enlisted November 20, 1897, in the United States Navy as a fireman of the second class, and rendered services under such enlistment until May 26, 1899, when, while serving as fireman, first class, on board the United States ship "Yorktown," a vessel of the United States naval forces, then at anchor in Iloilo harbor, Philippine islands, he was reported to the commanding officer of the vessel "as having refused to do duty," and by that officer immediately ordered to be

put "under sentries as a prisoner in single irons for safe keeping, to await trial by general court-martial."

He was continuously thereafter held such prisoner until July 5, 1899, when, pursuant to orders, he appeared for trial before a general court-martial on board the United States ship "Princeton," at Cavite, P. I. (R., 11).

On the trial he was charged with and found guilty of "refusing to obey the lawful order of a superior officer" (R., 18, 22), a very different and much more serious offense than that with which he was verbally charged when put under arrest.

The sentence of the court-martial, which was approved by the commander-in-chief, who convened the court, and the acting Secretary of the Navy, was that Smith should be confined in such place as the Secretary of the Navy may direct for a period of one year; that he should perform extra police duty during such confinement and lose his pay to the extent of $376, and at expiration of the term of confinement to be dishonorably discharged from the naval service (R., 22).

The naval prison at Mare island was designated as the place of confinement, the period of confinement to date from July 7, 1899 (R., 22).

Smith, having served out his period of confinement and been dismissed, brought his suit to recover from the United States the amount of money which had been withheld from him under the court-martial's sentence, asserting, for reasons which will hereafter appear, that said court-martial was without jurisdiction to try him upon the charge of which he was found guilty, and that the sentence against him consequently was absolutely void.

The majority of the Court of Claims, being of opinion that the sentence of the court-martial was void, held with the claimant and rendered the judgment in his favor from which the pending appeal was taken.

Section 708, Revised Statutes United States, provides that "all appeals from the Court of Claims shall be * * * allowed under such regulations as the Supreme Court may direct." The "regulations" in this regard prescribed by this court provide that such appeals "shall be heard * * * upon the following record, and none other:

"1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.

"2. A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment or decree." * * *

As these "regulations" have the force and effect of law and have not been modified, it would seem reasonably certain that the "expert testimony" of Judge Advocate General Diehl, "prepared for the purposes of this case at the request of the Department of Justice" in the month of July, 1904 (Appellant's Brief, Appendix A, p. 25), seventeen (17) months after the rendition of the final judgment in the Court of Claims and five (5) months after the appeal had been docketed here, is entirely inadmissible, and neither it nor the many suggestions in appellant's brief, based upon it, are entitled to consideration here. If possible, they have even less relation to the merits of the case than the caustic comments of appellant's counsel on the majority opinion of the Court of Claims (Appellant's Brief, p. 12), or the contemptuous references to the attorneys who appeared for the appellee in the lower court (*Ib.*, p. 22).

STATEMENT OF FACTS.

From the record it appears that on the 20th of November, 1897, the appellee enlisted in the United States Navy as a fireman of the second class, to serve for three years from that date unless sooner discharged by proper authority; that he served under this enlistment, except when confined in the naval prison at Mare island, until the period of his confinement terminated and his dishonorable discharge from the naval service went into effect under the sentence of the court-martial above referred to (R., 11, 20,22).

On May 26, 1899, while serving as a fireman on board the U. S. S. "Yorktown," a vessel of the United States Navy attached to the Asiatic station, and at that time at anchor in Iloilo, P. I., he was reported by his superior to the commanding officer of said vessel "as having refused to do duty," and thereupon the commanding officer awarded him the following punishment: "Put him under sentries as a prisoner in single irons for safe keeping, *to await trial by general court-martial;*" and he was continuously held as such prisoner on said vessel until July 5, 1899, when he was sent, in the custody of a chief master at arms, to appear for trial before a *general court-martial* then convened on board the U. S. S. "Princeton" at Cavite, P. I. (R., 11).

On June 30, 1899, the following charge and specification of charge were preferred against the appellee by Rear Admiral Watson, the commander-in-chief of the United States naval force on the Asiatic station :

"ASIATIC STATION, FLAGSHIP 'BALTIMORE,'
"MANILA, P. I., *June* 30, 1899.

Charges and specifications of charges preferred by Rear Admiral John C. Watson, United States Navy, commanding United States naval force on Asiatic station, against John Smith, fireman, first class, United States Navy.

"*Charge.*—Refusing to obey the lawful order of his superior officer.

"*Specification.*—In that the said John Smith, a fireman, first-class, in the United States Navy, attached to and serving on board the United States steamer 'Yorktown,' at Iloilo, Philippine Islands, having on the twenty-sixth day of May, eighteen hundred and ninety-nine, been ordered by Assistant Engineer Pope Washington, United States Navy, the officer of the deck, to go on duty in the fire-room of said vessel from noon until four hours post meridian of the said day, he having been previously detailed for this duty, did refuse to obey, and did willfully disobey, the said lawful order of his superior officer, the said Assistant Engineer Pope Washington, United States Navy, who was then and there in the execution of the duties of his office.

"J. C. WATSON,
"*Rear Admiral, U. S. Navy, Commander-in-chief*
"*U. S. Naval Force on Asiatic Station.*

"Witnesses: Lieutenant C. Thomas, U. S. N.; Assistant Engineer Pope Washington, U. S. N.; Chief Machinist G. B. Brownbridge, U. S. N."

"I certify that the accused received a true copy of this charge and specification at 10.30 a. m., July 1, 1899.

"DION WILLIAMS,
"*First Lieut., U. S. M. C., J. A.*"

(R., 18–19.)

On the same day the appellee, with other enlisted men of the crew of the "Yorktown," by order of her commanding officer, was ordered in double irons for safe keeping.

Upon the day the charges were preferred, June 30, 1899, said commander-in-chief, by virtue of the authority vested in him as such commander, contained in article 38, section 1624, Rev. Stats. U. S., appointed a general court-martial and ordered it to convene on Monday, July 3, 1899, on board the U. S. S. "Monadnock," at Cavite, P. I., for the trial of such persons as might legally be brought before it (R., 17).

Article 38 of section 1624, referred to, reads as follows:

"Art. 38. General courts-martial may be convened by the President, the Secretary of the Navy, or the commander-in-chief of a fleet or squadron; but no commander of a fleet or squadron in the waters of the United States shall convene such court without express authority from the President."

Although at the time in question Rear Admiral Watson, with his flagship, the "Baltimore," was at Manila, and therefore "in the waters of the United States," it does not appear that he had any authority from the President to convene such court.

June 30, 1899, Rear Admiral Watson transmitted the charge and accompanying specification bearing that date to First Lieutenant Dion Williams, the judge advocate, and on the following day, July 1, 1899, at 10.30 a. m., a copy of such charge and specification was for the first time delivered to the prisoner, Smith (R., 12, 18, 19).

On July 3, 1899, Rear Admiral Watson ordered said general court-martial to hold its further sessions on board the U. S. S. "Princeton," at Cavite, P. I. (R., 18).

On Wednesday, July 5, 1899, said general court-martial met on said U. S. S. "Princeton," at Cavite, P. I., pursuant to an adjournment taken from Monday, July 3, 1899, and proceeded with the trial of the appellee on the charge and specifications above set forth (R., 12). Upon the same day it found the specification of the charge "proved" and the

appellee "guilty" of the charge, and directed the judge advocate to record the following sentence:

"To be confined in such place as the Secretary of the Navy may direct for a period of one year; to perform extra police duties during such confinement; to lose all pay that may become due him during such confinement, except the sum of three dollars ($3.00) per month for necessary prison expenses, and a further sum of twenty dollars to be paid him at the expiration of his term of confinement, when he shall be dishonorably discharged from the United States Navy. Total loss of pay amounting to three hundred and seventy-six dollars ($376.00)" (R., 16).

On July 7, 1899, said proceedings, findings, and sentence were approved by Rear Admiral Watson, and the U. S. S. "Yorktown" was designated as the place of confinement of the appellee until an opportunity should offer for sending him to the United States in a public conveyance (R., 17).

On September 6, 1899, the acting Secretary of the Navy passed an order in which, after reciting the proceedings in the case, he said: "The prison at the navy yard, Mare island, has been designated as the place of confinement, the period thereof to take effect from July 7, 1899, the date of approval of the sentence."

Although the prisoner was put under arrest May 26, "to await trial by general court-martial," a court was not ordered, nor was the charge against him formulated until June 30. Although put under arrest for "having refused to do duty," the charge preferred against him more than a month later was for "refusing to obey the lawful order of his superior officer." He was not furnished with a copy of the charges, with the specifications, at the time of said arrest, as required by article 43, section 1624, of the Revised Statutes of the United States, which is as follows:

"Art. 43. The person accused shall be furnished with a true copy of the charges, with the specifications, *at the time he is put under arrest; and no other charges than those so fur-*

nished shall be urged against him at the trial, unless it shall appear to the court that intelligence of such other charge had not reached the officer ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent and can be produced at the trial; in which case reasonable time shall be given to the accused to make his defense against such new charge."

On the 27th of December, 1899, the appellee filed a petition in the Court of Claims to recover the pay which had been withheld from him by virtue of the sentence of said court-martial. This petition was subsequently amended three times. The cause finally came on for hearing upon the merits and upon the allegations of the third amended petition (which seems to have been omitted from the record, although the second amended petition is set forth therein, R., 1–2), and, on the 2d of February, 1903, resulted in a judgment in favor of the appellee for $376. From this judgment the appellant prayed and was granted an appeal to this court (R., 27, 29).

POINTS AND AUTHORITIES.

We contend that the general court-martial which tried, convicted, and sentenced the appellee was without jurisdiction of either the person or the offense, and its proceedings were consequently null and void for the following reasons:

I. Because under article 43, section 1624, of the Revised Statutes of the United States for the government of the Navy, the accused, the appellee here, at the time of his arrest, on May 26, 1899, was not furnished with a true copy of the charges and specifications of the offense for which he was then arrested and detained in custody until July 5, 1899, when he was tried, convicted, and sentenced.

II. Because on May 26, 1899, when said offense was committed, and on June 30, 1899, when said court-martial was convened, and on July 5, 1899, when the appellee was tried, convicted, and sentenced, the commander of the fleet who ordered said general court-martial and the squadron under his command were in the harbors of the Philippine islands, which were at that time, and had been since the ratification of the treaty between the United States and Spain, on April 11, 1899, " waters of the United States," and no express authority was obtained from the President of the United States to convene said court-martial, or if any such authority existed, it was not specifically set out in the order convening said court-martial, as required by article 1773, chapter 42, of the Regulations for the Government of the Navy of the United States, published in 1896, which were then in force.

I.

The court below found, and in fact it is conceded by the Government, that on May 26, 1899, when the appellee was arrested and ordered to be confined "as a prisoner in single irons for safe keeping, *to await trial by general court-martial*," he was not furnished with a copy of the charges and specifications of the offense for which he had been arrested and for which he was afterwards tried on July 5, 1899 (R., 11). The charges and specifications show upon their face that they were not prepared and sent to the judge advocate of the court-martial until June 30, 1899, and that no copy thereof was handed to the accused until 10.30 a. m., July 1, 1899, two days before the court convened (R., 18–19). In view of the fact that the commanding officer who ordered

his arrest directed him to be placed in irons to await trial by general court-martial, it cannot be made to appear that on that date he was simply temporarily confined until his offense could be investigated preparatory to his arrest for trial.

The nature of the arrest in this case clearly distinguishes it from the case of *Johnson vs. Sayre* (158 U. S., 109–117), upon which so much reliance is placed by counsel for the United States. In that case, as is pointed out in the opinion of the court, Sayre was taken into custody to await the result of a board of inquiry, which under section 1624 of the Revised Statutes and the Naval Regulations could only ascertain the facts and had no authority to try or convict him for any offense against the Naval Regulations which its investigation disclosed. Sayre, as the board found, was not put under *arrest for trial* until the Secretary of the Navy had approved the report of the board of inquiry and had ordered a court-martial to convene to try him. He was then furnished with a copy of the charges and specifications.

In the case at bar the appellee was arrested and confined *for trial*. It is not claimed, and upon the facts set forth in this record it can not successfully be contended, that he was confined by way of punishment or to await an investigation of his offense by his superior officers. The plain provisions of article 43 that "*the person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; and no other charges than those so furnished shall be urged against him at the trial*," were therefore inexcusably violated.

It necessarily follows that if the accused can be tried *only upon the charge furnished at the time of his arrest*, if *no* charges were furnished him at the time of his arrest, for trial on May 26, 1899, there were none in existence upon which he could have been legally tried on July 5, 1899. There was on that date no charge nor specification of charge before the court to give it jurisdiction of the offense. On May 26 he was

reported for "having refused to do duty." Without investigation or delay, and without any "altercation at the mast," he was ordered to be put under sentries as a prisoner in single irons, "to await trial by general court-martial."

This was not in accord with the provisions of section 1034 of chapter 23 of the Naval Regulations of 1896 then in force, which reads as follows:

"1034. (1.) In order to avoid unnecessary recourse to courts of inquiry and general courts-martial, it is directed that where an officer or other person shall be reported for grave misconduct to his immediate commanding officer, the latter shall institute a careful inquiry into the circumstances on which the complaint is founded. To this end he shall call upon the complainant for a written statement of the case, together with a list of his witnesses, mentioning where they may be found, and a memorandum of any documentary evidence bearing upon the case which it may be in his power to produce.

"(2.) He shall also call upon the accused for such counter-statement or explanation as he may wish to make, and for a list of the persons he desires to have questioned in his behalf."

On May 26 he was charged with a simple offense, the punishment of which was within the competency of the captain of the vessel or of a summary court-martial. On July 5, having been continuously under "arrest for trial," he was required, before a general court-martial, to respond to the grave charge of "refusing to obey the lawful orders of his superior officer," the prescribed punishment for which is "death, or such other punishment as a court-martial may adjudge."

He was arrested and charged with a misdemeanor. He was tried and convicted of a felony, and the indictment upon which he was tried was not furnished at the time of his "arrest for trial."

The failure to furnish him with a copy of the charge, as required by the statute, is not a mere *irregularity in pro-*

cedure which may be waived, and which generally is not subject to review, but is a *jurisdictional defect*, which renders the action of the court-martial void and opens its sentence to attack in any collateral proceeding which may be instituted in any civil tribunal.

The law upon this subject is succinctly stated in the leading case of *Dynes vs. Hoover* (20 How., 65, 81–82), as follows:

"Persons, then, belonging to the army and navy are not subject to illegal or irresponsible courts-martial, when the law for convening them and directing their proceedings of organization and for trial have been disregarded. In such cases, everything which may be done is void—not voidable, but void; and civil courts have never failed, upon a proper suit, to give a party redress, who has been injured by a void process or void judgment. In England, it has been done by the civil courts, ever since the passage of the Mutiny act of William and Mary, ch. 5, 3d April, 1689. And it must have been with a direct reference to what the law was in England, that this court said, in Wise *v.* Withers, 3 Cr., 337, that in such a case 'the court and the officers are all trespassers.' When we speak of *proceedings* in a cause, or for the organization of a court and for trials, we do not mean mere irregularity in practice on the trial, or any mistaken rulings in respect to evidence of law, but of a disregard of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of the law."

The following extract from the recent case of *McClaughry vs. Deming* (186 U. S., 49, 62–63) shows that the principles established by *Dynes vs. Hoover* have never been departed from in this court, and that a court-martial has always been regarded as a tribunal of limited powers—the creature of statute—whose proceedings must strictly conform to the statute in order to possess any validity.

"A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is

without jurisdiction. It was said by Mr. Chief Justice Waite in *Runkle v. United States*, 122 U. S., 543, 555:

"'A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose, and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved. 3 Greenl. Ev., sec. 470; *Brooks v. Adams*, 11 Pick., 441, 442; *Mills v. Martin, supra; Duffield v. Smith*, 3 S. & R., 590, 599. Such, also, is the effect of the decision of this court, in *Wise v. Withers*, 3 Cranch, 331, which, according to the interpretation given it by Chief Justice Marshall in *Ex parte Watkins*, 3 Pet., 193, 209, ranked a court-martial as 'one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.' To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; *that all the statutory regulations governing its proceedings had been complied with*, and that its sentence was conformable to law. *Dynes v. Hoover*, 20 How., 65, 80; *Mills v. Martin*, 19 Johns., 33. *There are no presumptions in its favor, so far as these matters are concerned.* As to them, the rule announced by Chief Justice Marshall in *Brown v. Keene*, 8 Pet., 112, 115, in respect of averments of jurisdiction in the courts of the United States, applies. His language is: 'The decisions of this court require that averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments.' *All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout.* The facts necessary to show their jurisdiction, and that their sentences were conformable to law, must be stated positively; and it is not enough that they may be inferred argumentatively."

While it is true that in *Keyes vs. United States* (109 U. S., 336), relied upon by the appellant, it is held that where, as in that case, it is undisputed that "the court-martial as a general court had cognizance of the general charges made and had jurisdiction of the person," *irregularities* or *errors in the proceedings* could not be questioned in a col-

lateral way, Mr. Justice Blatchford distinctly says that "where there is no law authorizing the court-martial, or *where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment.*"

And in *Ex parte Reed* (100 U. S., 13, 23), where this court found "there was no defect of jurisdiction as to anything that was done," it was also held that "every act of a court beyond its jurisdiction is void." See also Runkle's case (122 U. S., 543, 555–556).

The failure to furnish the appellee with a copy of the charges and specifications on May 26, 1899, the time of his arrest and confinement for trial before a general court-martial, was not only a violation of article 43, section 1624, of the Revised Statutes, but was also a violation of section 2, chapter 42, article 1778, of the Naval Regulations for 1896, which provides:

"When, therefore, such competent officer shall decide to have a party tried by court-martial, he will cause such charges and specifications against him to be prepared as he may consider proper *and will transmit a true copy of them with an order for the arrest or confinement of the accused to the proper officer, who will deliver such order to the accused and will carry it into effect by delivering to him a copy of the charges and specifications*, and if an officer by receiving his sword."

This section of the regulations plainly refers to both officers and men and requires that both shall be furnished with a copy of the charges and specifications at the time of the arrest *or* confinement, and contains the additional provision that where the accused is an officer his sword shall be taken from him.

The meaning of this section of the Naval Regulations is made more clear by section 6, article 1819, relating to the trial, which provides:

"Should the convening power authorize the judge advocate to amend legal defects in the charges and specifications

before the accused is called on to plead, it is to be understood that in doing so the judge advocate is strictly responsible that the facts are not changed, nor the legal responsibility weakened. He shall on every occasion communicate to the accused any alterations in the charges *which were delivered to him at the time of his arrest*, as soon as possible after such alterations shall have been made."

Counsel for the Government, in attempting to strengthen the apparent weaknesses in their case, have attached to their brief as an appendix an argument of the judge advocate general of the navy based upon the practice of the Department and the Naval Regulations for 1900. Those regulations are not applicable to this case, and we submit that a practice or custom of the Department, no matter how long continued, which is contrary to the express provisions of the statute, cannot have the force of law nor make valid acts otherwise illegal. The *ex post facto* opinion of the judge advocate general, which it is attempted to inject into this record in an irregular manner, is not entitled to any more consideration than his oral statement before the bar of this court would be if he attempted to testify here as a witness upon appeal.

Counsel for the appellant strenuously insist that the appellee waived the failure to furnish him a copy of the charges and specifications at the time of his arrest because he pleaded not guilty, stated that he did not desire counsel, and that he had no objection to any member of the court.

If the failure to comply with the express provisions of the statute and regulations constituted a mere irregularity in procedure, there might be some basis for the Government's contention; but if such failure amounted to a jurisdictional defect, as we insist, it could not have been waived by any action of the accused. The following quotation from McClaughry *vs.* Deming (186 U. S., at page 66) is peculiarly applicable upon this point:

"But it is said defendant did not object to being tried by this illegally constituted court, and that his consent waived the question of invalidity. We are not of that opinion. It was not a mere consent to waive some statutory provision in his favor which, if waived, permitted the court to proceed. His consent could no more give jurisdiction to the court, either over the subject-matter or over his person, than if it had been composed of a like number of civilians or of women. The fundamental difficulty lies in the fact that the court was constituted in direct violation of the statute, and no consent could confer jurisdiction over the person of the defendant or over the subject-matter of the accusation, because to take such jurisdiction would constitute a plain violation of law. His consent had no effect whatever in the face of the statute which prevented such men sitting on the court. The law said such a court shall not be constituted, and the defendant cannot say it may, and consent to be tried by it, any more than he could consent to be tried by the first half a dozen private soldiers he should meet; and the decision of neither tribunal would be validated by the consent of the person submitting to such trial."

In this case the Navy Department desires to torture the simple and frank conduct of a friendless and helpless seaman, who had been under arrest and in irons for six weeks, who had had no copy of the charge against him submitted for his examination until two days before his trial, who had had no opportunity to retain counsel for his defense, who was chained to a ship thousands of miles away from home, and completely under the control and at the mercy of his accusers, into a waiver of defenses jurisdictional in character and such as would be most unlikely to suggest themselves to his limited intelligence.

Section 4, article 1805, of the Naval Regulations relating to the duties of the judge advocate, provides:

"Justice being the object for which a court is convened, the judge advocate, although he is not for a moment to forget his duties as prosecutor, will at all times *prevent* the accused, if he is not assisted by counsel, from advancing anything which may tend either *to criminate him or prejudice his*

cause, more especially if he shall appear to be ignorant or inexperienced. Should the accused have no competent adviser the judge advocate shall also see that no illegal testimony is brought against him, and shall direct him how to present to the court, in the most efficient manner, the facts upon which his defense is based."

In this case the judge advocate, instead of assisting the appellee, an untutored fireman, who was not represented by counsel, to make the necessary objections to the formation and jurisdiction of the court and the failure of his accusers to comply with the statute and regulations, permitted him to make admissions and adopt a course of conduct which are now invoked to his prejudice.

A waiver made unintentionally or without knowledge of one's rights is not binding (*Bennecke vs. Insurance Company*, 105 U. S., 359). In criminal cases the doctrine of waiver by the accused of his statutory or constitutional rights is applied to a very limited extent (Cooley's Constitutional Limitations, 7th ed., p. 252).

In the civil courts the seamen upon our merchant vessels are regarded as "wards of the admiralty" and their rights are jealously guarded. Can this country afford to deny to the seamen who man its ships of war and sacrifice their lives for their country's good the measure of justice and equality which it insists upon for the crew of a fishing smack upon the banks of Newfoundland? No better argument of this matter could be presented than that made by Chief Justice Nott in disposing of the demurrer in this case in the court below. Said he:

"Mariners, whether in the merchant service or in the navy, are, in the words of Story (1 Eq. Juris., 332), 'a strangely improvident class of men, who seem to have mixed up in their character qualities of very opposite natures, and who seem, from their habits, to require guardianship during the whole course of their lives, having at the same time great generosity, credulity, extravagance, heedlessness, and bravery.' 'Courts of equity,' he adds, 'are

always supposed to take an indulgent consideration of their interests and to treat them in the same light with which young heirs and expectants are regarded. Hence it is that contracts of seamen respecting their wages and prize money are watched with great jealousy, are generally relievable whenever any inequality appears in the bargain, or any undue advantage has been taken.' Lord Stowell in the leading case of the 'Juliana' (2 Dodson, 504), held that they should be relieved from the consequences of their own act, that of signing shipping articles whereby their wages might be inequitably forfeited.

"And there is good reason for this; for sailors when on shipboard are beyond the reach of a writ of *habeas corpus;* are without legal advice, and in the preparation of a defense without professional assistance, and on trial they become very near to being practically defenseless; for a judge advocate, like other men, cannot well serve two masters. In courts of equity, and in courts of admiralty, and in legislative halls sailors have always been more or less subjects of protective jurisprudence or protective legislation, and to deprive a seaman of his wages one must proceed according to law and equity. In civil life a man cannot be deprived of life, liberty, or property, except by due process of law. In the army and navy the proceedings are different, the safeguards are less assured, but the principle is the same. Neither Congress nor the courts have ever sanctioned arbitrary arrests or illegal imprisonment or the deprivation of a statutory right. And among the statutory rights which the military or naval prisoner has is that of being promptly informed of the offense whereof he stands accused. An entry on the log is not notice to the prisoner, for he has not access to the log. In the present case the seaman has been deprived of his wages; that is to say, of his property, and this court cannot say that it has been done according to the plain and just purpose of the statute, which was intended to guard the personal rights of officers and men in the navy" (R., 8).

II.

The second proposition upon which we rely arises upon the face of the record and goes directly to the jurisdiction of the court-martial.

Under the decisions in the Insular cases it seems that there can be no doubt that after the ratification of the treaty of peace between the United States and Spain, on April 11, 1899, the Territory of Porto Rico and the Philippines ceased to be foreign land and became territory of the United States.

De Lima vs. Bidwell (182 U. S., 1).

Dooley vs. United States (182 U. S., 222, 234; 183 U. S., 151).

Fourteen Diamond Rings vs. United States (183 U. S., 176).

In the last-mentioned case the Chief Justice, in delivering the opinion of the court, said:

"The Philippines, like Porto Rico, became, by virtue of the treaty, ceded conquered territory or territory ceded by way of indemnity. The territory ceased to be situated as Castine was when occupied by the British forces in the war of 1812, or as Tampico was when occupied by the troops of the United States during the Mexican war, 'cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part.' *Thorington vs. Smith*, 8 Wall., 10. The Philippines were not simply occupied but acquired, and having been granted and delivered to the United States, by their former master, were no longer under the sovereignty of any foreign nation.

* * * * * * *

"No reason is perceived for any different ruling as to the Philippines. By the third article of the treaty Spain ceded to the United States 'the archipelago known as the Philippine Islands,' and the United States agreed to pay to Spain the sum of twenty million dollars within three months. The treaty was ratified; Congress appropriated the money; the ratification was proclaimed. The treaty-making power, the executive power, the legislative power, concurred in the completion of the transaction.

"The Philippines thereby ceased, in the language of the treaty, 'to be Spanish.' Ceasing to be Spanish, they ceased to be a foreign country. They came under the complete and absolute sovereignty and dominion of the United States,

and so became territory of the United States, over which civil government could be established. The result was the same although there was no stipulation that the native inhabitants should be incorporated into the body politic, and none securing to them the right to choose their nationality. Their allegiance became due to the United States and they became entitled to its protection.

"But it is said that the case of the Philippines is to be distinguished from that of Porto Rico because on February 14, 1899, after the ratification of the treaty, the Senate resolved, as given in the margin (pp. 179–180), that it was not intended to incorporate the inhabitants of the Philippines into citizenship of the United States, nor to permanently annex those islands.

"We need consider the force and effect of a resolution of this sort, if adopted by Congress, not like that of April 20, 1898, in respect of Cuba, preliminary to the declaration of war, but after title had passed by ratified cession. It is enough that this was a joint resolution; that it was adopted by the Senate by a vote of 26 to 22, not two-thirds of a quorum: and that it is absolutely without legal significance on the question before us. The meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it. What view the House might have taken as to the intention of the Senate in ratifying the treaty we are not informed, nor is it material; and if any implication from the action referred to could properly be indulged, it would seem to be that two-thirds of a quorum of the Senate did not consent to the ratification on the grounds indicated.

"It is further contended that a distinction exists in that while complete possession of Porto Rico was taken by the United States, this was not so as to the Philippines, because of the armed resistance of the native inhabitants to a greater or less extent.

"We must decline to assume that the Government wishes thus to disparage the title of the United States, or to place itself in the position of waging a war of conquest.

"The sovereignty of Spain over the Philippines and possession under claim of title had existed for a long series of years prior to the war with the United States. The fact that there were insurrections against her or that uncivilized tribes may have defied her will did not affect the validity of her title.

She granted the islands to the United States, and the grantee in accepting them took nothing less than the whole grant.

"If those in insurrection against Spain continued in insurrection against the United States, the legal title and possession of the latter remained unaffected.

"We do not understand that it is claimed that in carrying on the pending hostilities the Government is seeking to subjugate the people of a foreign country, but, on the contrary, that it is preserving order and suppressing insurrection in territory of the United States. It follows that the possession of the United States is adequate possession under legal title, and this cannot be asserted for one purpose and denied for another. We dismiss the suggested distinction as untenable."

If the soil of the Philippines is the territory of the United States, the harbors, bays, and other indentations of the coast, to a distance of three miles from the shore, necessarily become "waters of the United States" within the meaning of article 38, section 1624, of the Revised Statutes of the United States, hereinbefore quoted.

In *Huus vs. New York and Porto Rico Steamship Company* (182 U. S., 392) this court held that the ports of Porto Rico became ports of the United States after the ratification of the treaty of peace.

In *Gonzales vs. Williams* (192 U. S., 1, 14) it was held that under the immigration laws Gonzales, a native of Porto Rico, seeking entrance into the ports of the United States, was not a passenger from a *foreign* country, but was a passenger from a territory or other place subject to the jurisdiction of the United States.

The offense for which the appellee was arrested and confined occurred in the harbor of Iloilo, a harbor of the Philippines, May 26, 1899, six weeks after the ratification of the reaty of peace between the United States and Spain (R., 13).

The order convening the general court-martial was issued from Manila, P. I., on June 30, 1899 (R., 17), and the court was held on the U. S. S. "Princeton" at Cavite, P. I., on July 3–5, 1899 (R., 18).

The order of Rear Admiral Watson convening the court recites: "By virtue of the authority vested in me as contained in article 38, section 1624, title XV, chapter 10, of the Revised Statutes of the United States, a general court-martial is hereby ordered to convene," &c. (R., 17).

This article, as has already been pointed out in the statement of facts, provides that "no commander of a fleet or squadron *in the waters of the United States* shall convene such court without express authority from the President."

In addition to the provisions of this article, the Naval Regulations, published in 1896, bearing upon this subject are as follows:

"If, in the opinion of the commander-in-chief or senior officer present, a trial by court-martial is necessary, and the alleged wrong shall have occurred within the waters of the United States, he shall submit a succinct report of the case, together with all the correspondence relating thereto, to the Secretary of the Navy, *unless, as commander-in-chief of a fleet or squadron within the waters of the United States, he be expressly authorized by the President to order courts-martial.* Officers empowered to order courts-martial will in such case proceed at once to prefer charges against the offender and convene a court for his trial."

Chapter XXIII, section 4, article 1064.

"Commanders of fleets or squadrons *serving in the waters of the United States*, although not empowered to order general courts-martial, except by express authority of the President of the United States, are expected on the occurrence of any matter serious enough in their judgment to require thorough investigation, to order a court of inquiry as soon as practicable, and on the proceedings being closed, to submit them by the earliest opportunity to the Secretary of the Navy, in order that he may act advisedly in any course he may think proper to pursue."

Chapter XL, section 1, article 1720.

"(1.) General courts may be convened by the President, by the Secretary of the Navy, or by the commander-in-chief of a fleet or squadron.

"(2.) The exercise of this power by commanders-in-chief within the waters of the United States is forbidden except by express authority from the President; but this authority is usually granted, *and whenever exercised the fact of express authorization must be stated in the convening order.*"

Chapter XLII, section 1, article 1773.

The rear admiral who convened the court-martial in this case had no express authority from the President, and, as appears from the recitals in his order, did not pretend to have any such. It is evident that he regarded himself as upon a foreign station and not *in the waters of the United States.* Without such express authority from the President, nevertheless—and if any existed it must have been recited in the order convening the court—Rear Admiral Watson had no power to lawfully assemble such a court, and all proceedings taken and acts done by the court pursuant to such order were *coram non judice.*

It is therefore respectfully submitted that the sentence imposed upon the appellee by the general court-martial was void for want of jurisdiction of both the person and the offense, and that the judgment of the Court of Claims awarding him the wages of which he was deprived by such sentence should be affirmed.

FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
For Appellee.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 184.

THE UNITED STATES, APPELLANT,

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SUPPLEMENTAL STATEMENT ON BEHALF OF THE APPELLEE.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 15389

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(NOTE.—"N. R." herein refers to the Navy Regulations of 1896, which are identical with those of 1900, except that the latter added article 1077 (2) after litigation for seamen had begun, thus seeming to change the meaning of the regulations.)

1. The meaning of "charges" and "arrest" in article 43, Revised Statutes, 1624, becomes plain on tracing the origin of article 43 back to the British Articles of War of 1765, section 15, articles 17, 18, and 19. These, in force at the beginning of our Revolutionary War, read:

"* * * Whenever any officer or soldier shall commit a crime * * * he shall be put in arrest * * * till he shall be either tried by a court-martial or * * * dis-

charged. * * * No officer or soldier * * * shall continue in his confinement more than 8 days, or until * * * a court-martial can be assembled. No * * * guard * * * shall refuse to receive or keep any prisoner committed by any officer * * * which officer shall, at the same time, deliver an account in writing, signed by himself, of the crime with which said prisoner is charged."

Articles 24 and 43, Revised Statutes, 1624, read:

"No commander shall inflict * * * arrest or confinement * * * longer than 10 days, unless a further period is necessary to bring the offender to trial by a court-martial. * * * The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest."

These British articles of 1765 are repeated successively in—

The Massachusetts articles of April 5, 1775.

The American articles of June 30, 1775.

The American articles of September 20, 1776.

The American articles of May 31, 1786.

(The above are quoted in Winthrop's Military Law, 1896, pp. 1475, 1483, 1500, 1506.)

Being carried through the later acts of Congress, these now appear as article 67, Revised Statutes, 1342. Green Bag for November, 1902, p. 520.

The first Congressman who sat down to write the first American Naval Code must have read the existing military code in framing article 38 of the act of April 23, 1800. The army's specific "account of the crime charged" was the navy's "charges, with the specifications." Notice of these was required to be given not only to the jailor, in reach of the prisoner, but to the accused himself. The furnishing of the specific "account" did not await a second fictitious arrest

of a person already in arrest—a second nominal arrest many months later.

2. To prevent any Secretary of the Navy, like Stanton, from continuing arrests like that of General Stone, in 1861–1862, Congress, on July 17, 1862, brought the "officer ordering the court" within the restrictions theretofore only on the "person demanding" (36 C. Cls., 320, 322).

3. Who was intended by the legislation of July 17, 1862, to furnish charges? The accuser who ordered the arrest. On the same July 17, 1862, Congress enacted article 71, Revised Statutes, 1342, providing that when one is "put in arrest for the purpose of trial, the officer *by whose order he is arrested* shall see that a copy of the charges on which he is to be tried is served upon him within eight days." The arresting officer was not the "officer ordering the court" (article 72, Revised Statutes, 1342). On the same July 17, 1862, also, Congress limited the discretion of naval commanders to determine what was "at the time," of an arrest for trial, to ten days. In the navy an arrest continued ten days is conclusively presumed by law (by article 24, Revised Statutes, 1624) to be an arrest for trial. Within ten days what was "at the time" was a question of fact (N. R., 1036).

Is it possible that on the same day Congress made such contradictory enactments as limiting arrests without notice of trial to eight and ten days, and at the same time indefinitely postponing the service of charges in the navy to a second merely nominal re-arrest at discretion? If that was the object, to provide for arrests like General Stone's, why did not a single Democrat object in Congress?

4. The Navy Regulations of 1896 themselves confess the needed construction of article 43 as to *officers*, refusing to recognize that article 43 says "persons," not, like the army's article 71, Revised Statutes, 1342, "officers" only. These regulations, pages 203–204, read:

"1034. * * * When an officer *or other person* shall be reported for grave misconduct [*i. e.*, charged in a report] to his immediate commanding officer, the latter shall * * * call upon the complainant for *a written statement* * * * [and] upon the *accused* for such counter-statement * * * as he may wish to make."

[How can the accused make a counter-statement unless he gets a copy of the "written statement" of the charge with its specifications? This, as will be seen from articles 1035, 1039, is given only to "officers."]

"1035. * * * Officers to whom such *reports* or *complaints* are submitted for statement must not reply by making *countercharges*. Officers desiring to *prefer charges* against others should make them independently.

"1039. Whenever an accusation is made against an officer * * * a copy of such * * * *shall be furnished at the time* to the officer *accused*.

"1037. If * * * the commanding officer shall be satisfied that the *charge* is such as to call for judicial action, he shall transmit to the Secretary * * * or Commander-in-chief * * * a particular statement of the misconduct with which the accused is *charged* * * * [*i. e.*, charges and specifications]." The charges are then framed for trial, and notice of their statement given the accused by a second copy.

Military accusations and "charges" are thus the same. A "complaint" constitutes the "charges and specifications" in rough form. A "report contains charges" (index to N. R. of 1896, p. 496) and perhaps other things.

5. Secretary Elihu Root "directed" the following explanations, showing that charges may be furnished by any one:

"Military charges, though commonly originating with military persons may be initiated by civilians. * * * So a charge may originate with an enlisted man. * * * Charges proceeding from a person outside the army * * * should be sustained by affidavits. An officer is not disqualified from preferring charges by the fact that he is himself under charges. * * * Held, a sufficient compliance with the requirement as to the service of charges, to have served a true copy of the existing charges and specifications * * * though the charges themselves were not in sufficient legal form and were intended to be amended and redrawn" [*i. e.* "framed"] ("Military Laws," Doc. 545, H. R., 56th Cong., 2d sess., pp. 677, 678, 679).

6. The captain of a war vessel represents the United States. Notice to him, "intelligence of a charge," is notice to the United States and to all intermediate officials, such as the "officer ordering the court." If he ignores a charge and does not furnish it, it is, by the regulations themselves, excluded from the jurisdiction of a court-martial (Navy Reg. (1896), pp. 203, 207, arts. 1034, 1036, 1060).

7. Were there any doubt, a court must "select that construction which best comports with the genius of our institutions" (162 U. S., 218; American Law Review, Sept.–Oct., 1903, pp. 696–702). What that "genius of our institutions" is has been reiterated by successive Secretaries of State for the benefit of American citizens in foreign countries, almost in the very words of article 43:

"That an *accused person shall* immediately upon *arrest* be informed of the *specific* offense upon which he is held * * * are essentials to every criminal prosecution, necessary alike to the protection of innocence and the ascertainment of

guilt" (Secretary of State to James Russell Lowell, Minister to England, June 2, 1881).

"It has, from the very foundation of the Government, been its aim that its citizens abroad should be assured of the guarantees of law, that *accused persons* should be apprised of the specific offense with which they might be *charged*" (Secretary Evarts to Aristarchi Bey, Dec. 8, 1877).

2 Wharton's International Law Digest, 443, 453.

Albany Law Journal, Oct., 1903, pp. 305–307.

8. In Johnson *vs.* Sayre, 158 U. S., 117, the accused was tried on a "new charge," which took a court of inquiry to get "intelligence" of. The case came within the exception to article 43.

There was nothing for the court to construe in this case but what was a "reasonable time to make his defense." The court held that four days was enough, and that it was doubtful whether he could plead that he had not had time to make his defense, when he had already made it. The court said:

"Art. 43 * * * refers to the time when he is arrested for trial [and punishment on a charge] and not to the time of any previous arrest * * * by way of punishment" [on the same charge].

The court did not mean to hold that there could be two successive punishments on the same charge by the naval authorities (177 U. S., 160). The theory that two or more successive arrests for trial on the same charge was meant to be endorsed is therefore untenable.

9. The court was betrayed into a vagueness of language in 158 U. S., 117, by the unexplained regulation in the footnote, page 112. The mystery of this is revealed in the Navy

Regulations of 1865, paragraphs 1203, 1213. These provided that the arrest of an officer (only) should be deferred until just before trial, because of the frequent complexity of the charges against him and because the Navy Department of 1865 commanded a stringent compliance with article 43, even as to the wording of the charges. Right as to the necessity of furnishing charges on arrest, the Navy Department was wrong in its stringency as to the language in which the charges were made. That could have been altered, and the Navy Regulations of 1870 and subsequently said so in the rule now article 1819.

10. Francis Scott Key, author of the "Star Spangled Banner," when Assistant Attorney General, rendered an opinion, June 26, 1839, in a naval court-martial case where the accused claimed that "charges and specifications" were not the subject of restatement by the Secretary of the Navy (Doc. 244, H. R., 1st sess., 26th Cong.). Key said:

"Lieut. Hooe was * * * tried on charges made out and signed by the Secretary of the Navy upon the information of Commander Levy, who, as his commanding officer, had arrested him, and made out charges and specifications, of which a copy was given to him. These being sent to the Secretary of the Navy, were modified and reduced in number. On these he was ordered to be tried. He objected to be tried on these charges, contending that the original charges and specifications could not be in any manner altered or signed by the Secretary, and that he could only be tried on the original charges and specifications as stated by the officer accusing him. * * * The power exercised by the Secretary is necessary and proper, on account of the accused himself, and for all the purposes of justice. The person making charges against, and demanding the trial of a person answerable to martial law, may not be sufficiently acquainted with the form of such proceedings, nor with the nature of military offenses, and the manner in which they should be charged;

and to call a court to try a person for a legal offense, without having the charge against him distinctly stated in legal form would be unjust and unreasonable. If the Secretary sees anything charged as a military offense, which is not so, or which is not sustained by the specifications, he certainly is not bound to send such a charge to a court to be tried. He has an undoubted right, and it is his duty, to examine the charges and specifications, put them in legal form, and if the facts specified maintain the charges, send them to be tried. * * * The words 'nor shall any other charge or charges than those so exhibited be urged against the person,' are not violated here, as the accused supposes. The original articles signed by Commander Levy charge 9 offenses; and the paper on which he is tried contains 3 charges, but those 3 charges are all found among the 9 preferred and signed by Commander Levy—so that no other charge could be urged against him than such as was originally exhibited."

Hooe's claim, that the law cared for the form rather than the substance, the wording of the charges rather than the facts stated in them, is appellant's claim today. It was fitting that this plea for Bastille-like imprisonment should have been overruled by the author of the national song of freedom.

11. The cotemporary executive construction of the act of July 17, 1862, is found in Secretary Welles' regulations of 1865, which follow. What is capitalized is omitted from the regulations of today. What is italicized is the insertion of today. The combination explains the misleading regulation quoted in a foot-note in Johnson *vs.* Sayre, 158 U. S., 112:

"1203. As THE LAW REQUIRES THAT THE PERSON ACCUSED SHALL BE FURNISHED WITH A TRUE COPY OF THE CHARGES, WITH THE SPECIFICATIONS, AT THE TIME HE IS PUT UNDER ARREST, AND AS the officer empowered to convene a court-martial is to exercise his discretion either to dismiss a com-

plaint against a party or have it investigated by such court, and to direct what portion of the complaint [*i. e.*, the mixture of charges and what is not such] in the event of a trial, shall be embodied or omitted in the charges and specifications PREFERRED BY A COMPLAINANT, THE GENERAL RULE SHOULD BE TO LEAVE THE AUTHORITY OF ARRESTING AN OFFICER [because of the frequent complexity of charges againt officers and the fatal results of variance] TO BE EXERCISED BY THE SUPERIOR WHO MAY ORDER A TRIAL TO TAKE PLACE. [Being thus not yet in arrest:—]

"1213. On the decision of a competent officer to have a party tried by a court-martial, he will cause such charges and specifications against him to be prepared as he may consider proper, and will transmit a true copy of them, with an order for the arrest *or confinement* of the accused, to the proper officer, who, on exhibiting such order to the accused and carrying it into effect by, *if an officer*, receiving his sword, will at that time deliver to him SAID *the* copy of the charges and specifications."

By leaving out the explanations of 1865 and by including imprisoned men in its provisions, Naval Regulations, art. 1778 (*q. v.*), totally changes the apparent, but not the real, meaning of this rule.

12. The Senate Judiciary Committee and, on behalf of commerce, the Senate Committee on Commerce, have unanimously approved and found, sitting in a judicial capacity, the construction of article 43 of the Revised Statutes, 1624, to be as urged by appellee (Senate Reports, 1422, 57th Cong., 1st sess., and 805, 58th Cong., 2d sess.). The merchant marine wants its naval guards so intelligently counseled that the enormous rate of desertion will be decreased (New York Maritime Register, November 9, 16, 23, 2; October 26, 1904).

13. Not a single court-martial order in the War or Navy Department can be found which declines to set aside even

a non-jurisdictional error because the accused soldier or sailor was not lawyer enough to criticise his superiors. To command that they must do this on penalty of imprisonment for "waiver" would be an unwelcome and unfitting doctrine for military discipline.

14. **Attention is especially called** to the argument for claimant in 36 C. Cls., 308–318, which is not included here. Appellee's brief, page 9, reads: "On May 26, the appellee was arrested. The charges show upon their face that they were not prepared and * * * handed to the accused until June 30." It is because appellant admits that only this statement of the charges against the accused was furnished him that this shows that article 43 was not complied with. The quoted passage must not be regarded as a claim that the admiral's version of the charges should have been given the accused when his captain had committed him for trial.

15. A statute is to be construed by the evil it is designed to guard against. Testing Smith's defense (R., 19) by the Navy Regulations, art. 1805, we find that it was written by the prosecutor under orders "not for a moment to forget his duties as prosecutor." Striking out the careful admissions of the specifications which he got Smith to sign, and regarding only what the Navy Regulations, art. 1805, authorized him to include as "facts upon which the defense was based," we find that Smith is thus admitted by the prosecutor to have been on watch from 4 a. m. to 12 m., and, being ordered to unfit himself for his coming night watch from 8 p. m. to midnight by taking an extra watch from noon to 4 p. m.,

that what he really did was to ask to appeal to the captain before needlessly enduring the 12 m. to 4 p. m. watch. He had a right to appeal. (N. R., 54 (9.) Had his appeal been charged as disobedience instead of not doing duty, had he got precise written notice of the important distinction at the time, he could have summoned bystanders to store up in their memories the exact words spoken by him to show that he did not disobey at all. Withholding written charges thus enables interested accusers to deceive, and results in the surprise and conviction of the innocent who are too ignorant, uncounseled, and defenseless to analyze error.

SUMMARY.

Whether one has been put under arrest for trial is, before the confinement has continued ten days, a presumption of fact, determined by the acts or orders of the superior (N. R., 1036). After ten days it is a conclusion of law (art. 24, R. S., 1624).

Any one may "prefer charges" (N. R., 1035). It is the captain's duty to "submit a written statement" of them to his prisoner (N. R., 1034, 1035; art. 71, R. S., 1342). They are framed in formal language by the fleet commander for trial, but they are not originated by him (N. R., 1037, 1038, 1050).

The captain represents the officer ordering the court for the reception and disposition of charges (N. R., 1034, 1036). Charges of which he has had "intelligence" and yet withheld from the accused under him cannot be tried. The seaman is protected by article 43 against his own ignorant waivers.

F. A. McKenney
Attorney for Appellee.

Supreme Court of the United States.

No. 184.—October Term, 1904.

The United States, Appellant, vs. John Smith. } Appeal from the Court of Claims.

[April 3, 1905.]

On May 26, 1899, John Smith was serving under enlistment as a fireman of the first class on board the United States naval vessel Yorktown, then at anchor in Illiolo harbor, Philippine Islands. On the date named Smith was reported to the commanding officer of the Yorktown as having refused to do duty, and consequently such officer ordered him "put under sentries as a prisoner in single irons for safekeeping to await trial by a general court martial." Subsequently, on June 30, 1899, Rear Admiral Watson, the commander-in-chief of the United States naval force on the Asiatic station, convened a general court martial, to meet on July 3, 1899, for the purpose of trying accused persons who might be legally brought before the court, and on the same day a charge was preferred against Smith, by the Rear Admiral, accompanied with a specification, for refusing to obey a lawful order of his superior officer. Smith, who as already stated had been placed under arrest on May 26, 1899, was served on July 1, 1899, with a copy of the charge and specification which had been preferred against him and an extra watch was put over him as well as over other prisoners who were being held for trial. On July 5, 1899, Smith was sent under guard before the court martial. He was tried, found guilty and sentenced "To be confined in such place as the Secretary of the Navy may direct for a period of one year, to perform extra police duties during such confinement, to lose all pay that may become due him during such confinement, except the sum of three dollars ($3.00) per month for necessary prison expenses, and a further sum of twenty dollars to be paid him at the expiration of his term of confinement, when he shall be dishonorably discharged from the United States Navy."

The term of imprisonment prescribed in the sentence was somewhat mitigated by the Secretary of the Navy. Thereafter, on being released, Smith sued in the Court of Claims to recover the pay which would have been earned by him had he been entitled to receive the same during the period covered by the sentence. The right to recover was based on the

averment that a copy of the charge had not been served on Smith when he was originally put under arrest on May 26, 1899, it being claimed that for this reason the judgment of the court martial was void. After finding the facts as above recited the Court of Claims concluded, as matter of law, that the claimant was entitled to recover, and from the judgment entered upon such finding the Government appealed.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

Article 43 of section 1624 of the Revised Statutes, upon which the Court of Claims based its legal conclusion that the action of the court martial in question was void because the charge and specification were not served upon the claimant at the time of the original arrest, reads as follows: "The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest."

It is conceded by the findings that at once when the charge and specification were formulated by Rear Admiral Watson and the court martial was ordered to be convened, a copy of the charge and specification was served upon Smith. It is also established by the findings that no objection as to tardiness of service was made at the time of trial. Conceding, *arguendo* solely, and without so deciding, that under these circumstances the objection as to the lateness of the service was jurisdictional and could be collaterally inquired into, we think the contention is wholly devoid of merit. Nearly ten years before the trial in question was had, in the year 1890, the Secretary of the Navy submitted to the Attorney General the question of whether the arrest referred to in article 43 related to the preliminary arrest which might be consequent upon the commission of an offence, or applied to the arrest made after charges had been formulated and as court martial ordered. The Attorney General advised that the word arrest as employed in article 43 did not relate to the preliminary arrest or detention of an accused person awaiting the action of higher authority to frame charges and specifications and order a court martial, but to the arrest resulting from the preferring of the charges by the proper authority and the convening of a court martial. (19 Opinions of Attorney General, 472.) The reasoning by which the Attorney General reached the conclusion just stated we think was absolutely conclusive. Doubtless the opinion became the rule of practice in the Navy, and the construction affixed by the Attorney General to the statute was sanctioned by this court in *Johnson* v. *Sayre*, (158 U. S. 109,) and such construction has been reiterated in an opinion announced this day. (*Bishop* v. *United States*, U. S. .)

Whilst these considerations dispose of the contentions raised and passed on below, a new ground for reversal was urged at bar, founded on article 38 of section 1624 of the Revised Statutes. That article reads as follows:

"Art. 38. General courts martial may be convened by the President, Secretary of the Navy, or the commander-in-chief of a fleet or squadron; but no commander of a fleet or squadron in the waters of the United States shall convene such court without express authority from the President."

Although it is not denied that Rear Admiral Watson was a commander of a fleet within the meaning of that expression as employed in article 38, it is insisted that as he convened the court-martial while in Manila Bay, about six weeks after the treaty with Spain by which the Philippine Islands were acquired by the United States, therefore the fleet or squadron under his command was "in the waters of the United States," within the meaning of those words as employed in the enactment in question, and there was no power in the commander-in-chief to convoke a court martial without express authority from the President, which is not found to have been given. This objection, if well taken, is jurisdictional, but in our judgment it is without merit; and we reach this conclusion wholly irrespective of the status of the Philipine Islands.

The clause in question was originally enacted in 1862, before even the acquisition of Alaska, and was intended, we think, to apply to those waters within what was termed by Congress in the act of March 3, 1901, (31 Stat. L. 1108,) the continental limits of the United States. In other word, the provision in question did not take into view the dominion or sovereignty of the United States over territory beyond the seas and far removed from the seat of government, but contemplated waters within the United States in the stricter and popular sense of the term. Looking to the language used, in the light of the surrounding circumstances and the purpose which it was intended to accomplish, (*Platt* v. *Union Pacific R. R.*, 99 U. S. 64,) it is, we think, manifest that the prohibition against the convocation by the commander of a fleet or squadron of a general court-martial, without the previous authorization of the President, was intended to be operative only when the fleet or squadron was in a home port, as above defined. That is to say, that Congress contemplated the necessity of an order from the President when the circumstances supposed to require the convening of the court martial could be with facility submitted to the President for his action in the premises. To give a broad meaning to the expression "waters of the United States," as employed in Article 38, by construing those words as referring not only to the home waters but to far distant waters, would, we think, defeat the plain purposes of Congress and seriously impair, if not destroy, an important power vested in the commander of a fleet or squadron when at distant stations, remote from

the home country. Certainly, if the remoteness from the continental limits of the United States is immaterial and the restriction of Article 38 is applicable to the commander when his fleet or squadron is within waters thousands of miles removed from the boundaries of the United States, in the restricted sense of that term, no good reason is apparent why the commander of a fleet or squadron should not have been forbidden, without the leave of the President, to convoke a general court martial, irrespective of where his fleet or squadron might be situated.

Judgment reversed.

True copy.

Test:

Clerk Supreme Court, U. S.